COURT FILE NUMBER:	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TLI CHO LANDTRAN TRANSPORT LTD., 1456998 ALBERTA LTD., and 1456982 ALBERTA LTD.
APPLICANT	TLICHO INVESTMENT CORPORATION
RESPONDENTS	TLI CHO LANDTRAN TRANSPORT LTD., 1456998 ALBERTA LTD., AND 1456982 ALBERTA LTD.
DOCUMENT	**BENCH BRIEF OF LAW AND BOOK OF AUTHORITIES**
PARTY FILING THIS DOCUMENT	**TLICHO INVESTMENT CORPORATION**
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I INTRODUCTION

1. The applicant, Tłı̨chǫ Investment Corporation ("**TIC**" or the "**Applicant**") applies as a shareholder and creditor of the respondents for an order seeking various relief pursuant to the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36, as amended (the "**CCAA**"). This brief provides an analysis of material legal issues relevant to the initial application returnable November 29, 2019.

II BACKGROUND OF THE TŁĮCHǪ

2. The Tłı̨chǫ are an aboriginal people of Canada that have traditionally used and occupied lands in and adjacent to the Northwest Territories.

3. The Tłı̨chǫ Government was formed pursuant to an agreement between the Tłı̨chǫ, the Government of the Northwest Territories and the Government of Canada on August 25, 2003 (the "**Tłı̨chǫ Agreement**"). The Tłı̨chǫ Agreement was ratified by the *Tłı̨chǫ Land Claims and Self-government Agreement Act*, SNWT 2003, c 28.

4. The Tłı̨chǫ Government represents four Tłı̨chǫ communities in the Northwest Territories: Behchokǫ̀, Gamètì , Wekweètì and Whatì (the "**Tłı̨chǫ Communities**").

5. The Applicant is the ultimate parent company of each of the businesses and companies owned and operated by and on behalf of the Tłı̨chǫ Government. The Applicant employs directly and indirectly more than 450 employees, many of whom are residents of Tłı̨chǫ Communities. The Applicant is wholly owned by the Tłı̨chǫ Government.

III SUMMARY OF THE FACTS

A. <u>The Parties</u>

6. The Applicant is a material creditor and the ultimate parent company of the respondent, Tłı̨chǫ Landtran Transport Ltd. ("**Landtran**").

7. The Applicant is also the majority shareholder of the respondents of 1456998 Alberta Ltd. (the "**General Partner**"), and 1456982 Alberta Ltd. (the "**Limited Partner**") owning 90% of the voting shares of each company**,** which companies are the general partner and the limited partner of the Respondent, Ventures West Transport Limited Partnership ("**Ventures West**" and together with Landtran, the General Partner and the Limited Partner, the "**Transport Companies**").

8. Landtran is a corporation incorporated in the Northwest Territories, and extra-provincially registered in Alberta. The Limited Partner and the General Partner are corporations incorporated in Alberta, with registered offices in Edmonton, Alberta. Ventures West is registered as a limited partnership in Alberta.

B. Business of the Transport Companies

9. The Transport Companies operate a transportation services business which specializes in transportation across winter and ice roads in the Western provinces, the Yukon and the Northwest Territories.

10. The Transport Companies operate as an integrated business. The Transport Companies provide bulk transportation services, especially seasonally in February and March of each year during which time the winter roads are open and contracts are available to haul products, mainly fuel and cement, to various Northern diamond mines.

11. The Transport Companies' operations are headquartered in Sherwood Park, Alberta, where the Transport Companies lease office and yard space. The office and yard space has historically provided general management, accounting, human resources, mechanical inspection and maintenance, and sales and marketing functions for the Transport Companies on an integrated basis.

C. Liabilities

12. As at October 31, 2019, the Transport Companies had over $60 million in total liabilities, including:

    (a) the Transport Companies' unlimited guarantees of a loan made by the Canadian Bank of Imperial Commerce ("**CIBC**") to TIC, of which approximately $15.6 million is owing;

    (b) intercompany advances from TIC and the other Tłı̨chǫ companies to the Transport Companies in the amount of $37.6 million;

    (c) the office lease and the yard lease for the Transport Companies' head office located in Sherwood Park, Alberta, which, if the Transport Companies vacated the premises outside of the CCAA proceedings, may require payment in excess of approximately $750,000; and

    (d) Accounts payable in the amount of $3,700,116.

D. Loss of Fuel Contract

13. The Transport Companies' most significant contract was a five-year contract to supply fuel to a diamond mining operation located in the Northwest Territories (the "**Fuel Contract**"). The Transport Companies have provided fuel to the customer for approximately 10 years.

14. The Fuel Contract represented approximately 27% of the revenue of the Transport Companies, but such contract had historically been unprofitable for the Transport Companies. The Transport Companies' most recent Fuel Contract expired and in 2019 and the Transport Companies submitted a bid for a new five year fuel contract with revised

pricing to earn a modest profit margin. The Transport companies were ultimately unsuccessful in their bid and lost the Fuel Contract for 2020.

15. Outside of the Fuel Contract, the Transport Companies perform services under additional contracts, with the most significant three being for the supply of fuel and/or cement (the "**Additional Contracts**").

Financial Difficulties

16. The loss of the Fuel Contract resulted in the Transport Companies' revisiting their forecast for the 2020 fiscal year. It was determined that, should the Transport Companies operations be continued and the Transport Companies perform only the Additional Contracts, the Transport Companies would report an estimated net loss of approximately $9.3 million.

17. The forecasted losses to the Transport Companies due to the loss of the Fuel Contract are material and are in addition to years of significant losses already experienced by the Transport Companies.

18. Given the long-term financial difficulties faced by the Transport Companies, the Tłı̨chǫ Government and the Applicant engaged MNP Ltd. to assist them with conducting a strategic review of operations. Given their unsuccessful bid for the Fuel Contract, it was determined that the Transport Companies have material excess capacity and it is necessary to downsize their operations.

19. The Transport Companies have experienced years of significant financial difficulties and cannot continue to operate without extensive financial support. In order to pursue an arrangement that will maximize value for stakeholders and provide for an orderly wind-down, TIC makes an application for relief under the CCAA with respect to the Transport Companies.

20. The Tłı̨chǫ Government has advised the Applicant and the Transport Companies that it is considering whether or not to make available a fund of money for distributions to unsecured creditors. If made available, such a fund could form the basis of a plan of compromise or arrangement to be made to the unsecured creditors of the Transport Companies. It is very unlikely that such a distribution would be available if the Transport Companies were to become bankrupt.

IV ISSUES

21. The following issues arise on the within originating application by TIC:

    (a) What scope of relief is appropriate in light of recent amendments to the CCAA?

    (b) Does TIC have standing to bring the within application?

    (c) Is the within application properly brought in Alberta?

    (d) Does the CCAA apply to Landtran, the General Partner, and the Limited Partner?

(e) Should the relief sought extend to Ventures West?

V LAW & ARGUMENT

A. The Recently Enacted CCAA Provisions Limit The Relief Which Can Be Granted On An Initial Order

22. Recent amendments to the CCAA were proclaimed into force as of November 1, 2019 pursuant to the *Budget Implementation Act*, 2019, c. 29. The full text of the newly enacted provisions is attached hereto as **Schedule "A"**.

23. Section 11.02(1) states:

> A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

24. Section 11.001 states:

> An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period

25. The combined effect of these two new provisions is that (a) an order granted on an initial application under the CCAA may not be effective for more than 10 days, and (b) the relief granted pursuant to such order should be limited to that which is reasonably necessary for the continued operations of the debtor in the ordinary course during the initial period.

26. The purpose of the amendments was discussed by the Standing Senate Committee on Banking, Trade and Commerce (emphasis added):

> Division 5 of Part 4 also amends the *Companies' Creditors Arrangement Act* to, first, <u>limit the scope of initial court orders and interim financing, lessening the chances of extraordinary relief, such as the suspension of pension contributions being granted at the outset and giving courts more time to hear all parties' views before making more consequential orders</u>. Second, requiring creditors to disclose their real economic interests in proceedings, if required by courts, helping to preserve fairness in insolvency negotiations by rectifying informational imbalances amongst the parties. Third, in line with the *Bankruptcy and Insolvency Act* change proposed, clarifying that the duty of good faith applies to all parties.
>
> Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 56 (8 May 2019) at p 21 (Mark Schaan)[Tab 1].

27. The recent decision by the British Columbia Supreme Court in *Miniso*, which involved an application by a creditor for CCAA relief in respect of a number of debtor companies, is the only reported judicial decision to consider the recent amendments to the CCAA.

Miniso International Hong Kong Limited v. Migu Investments Inc., 2019 BCSC 1234 [*Miniso*] at paras 63-66, 76-80 [Tab 2].

28. In *Miniso* Justice Fitzpatrick confirmed that the intent behind the new s.11.02(1) was to "limit the exercise of discretion by the Court in determining the length of the stay, such that the maximum stay is 10 days, as opposed to the previous 30-day limit."

Miniso at para 66.

29. In *Miniso* the Court recognized that grating a shorter stay of proceedings on an initial application was an effort to balance the rights of stakeholders while still allowing a debtor company to be granted relief under the CCAA, especially in cases where there has been little or no notice given to other stakeholders before an initial application is heard.

30. The relief sought in the originating application of TIC in the within proceedings is limited to necessary relief to grant the Transport Companies the necessary stability and support to continue for the next 10 days.

31. Given section 11.02(1), the terms of the initial order will only remain effective for a period of 10 days.

32. The relief sought in the initial order includes a stay of proceedings and a limited administration charge. The relief is limited in scope to that which the Applicant submits is reasonably necessary for the continued stability of the Transport Companies during the initial period.

33. The administration charge sought in the initial order is limited in to an amount necessary to pay the reasonable fees and costs of the Monitor and its counsel, TIC's counsel and any counsel that may be retained by the Transport Companies during the first 10 days.

34. The initial order does not contain relief pertaining to an interim lending charge or a directors' and officers' charge, as may have been the case in initial orders granted before the amendments to the CCAA. Similarly, the initial order does not give TIC or the Transport Companies authority to file a plan of arrangement nor does it include any of the restructuring powers that can be found in the Alberta Template CCAA Order.

35. The initial order sought is compliant with the new provisions of the CCAA and the relief sought therein is necessary for the Transport Companies to stabilize and subsequently seek to restructure and maximize the value of their assets.

B. TIC has Standing as a Creditor to Bring the Application

36. As identified in the Affidavit of Mark Brajer sworn on November 27, 2019, in late 2015 TIC appears to have become a party to unanimous shareholders agreements in respect of each of the General Partner (the "**General Partner USA**") and the Limited Partner (the "**Limited Partner USA**" and together, the "**USAs**").

37. The General Partner USA provides, unless otherwise agreed to with unanimous approval of the shareholders, that that the board of directors of the General Partner shall not authorize the General Partner to, and the shareholders shall not cause or permit the General Partner to, (i) undertake the institution of proceedings in respect of the General Partner or Ventures West LP under the Bankruptcy and Insolvency Act (Canada) or any other analogous laws or the filing of a proposal to settle payments of creditors' liabilities under the Companies' Creditors Arrangement Act, (ii) admit in writing the insolvency of the General Partner or Ventures West LP, or (iii) take any corporate action in furtherance of any of the aforesaid purposes. The Limited Partner USA provides the same in respect of the Limited Partner, its shareholders, and board of directors.

38. The USAs also purport to remove from the board of directors of the General Partner the power to supervise the management and affairs of the corporation.

39. In many CCAA proceedings, it is the board of directors of the debtor company who resolve to seek relief under the CCAA. These directors' resolutions form the foundation of a debtor company's corporate authority to proceed with a restructuring.

40. Under the circumstances, TIC is of the view that it is the most appropriate party to bring an application for relief under the CCAA in respect of the Transport Companies.

41. Section 11 of the CCAA provides as follows:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> *CCAA*, s 11 [emphasis added].

42. As a creditor and majority shareholder of the Transport Companies, TIC is a "person interested in the matter" with standing to commence CCAA proceedings in respect of the Transport Companies.

43. In *Miniso,* the Court held that the "CCAA expressly grants standing to creditors… to commence proceedings in respect of a debtor company."

Miniso at para 45.
ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., [2008] OJ No 1818 at para 34 [Tab 3].
CCAA, ss 4 &5[Tab 4].

44. As identified above, TIC and other the Tłı̨chǫ Companies have made advances totalling $37.6 million to the Transport Companies.

45. The Applicant is a major creditor of the Transport Companies and Courts have confirmed that a creditor has standing to seek relief under the CCAA in respect of debtor companies.

C. Alberta Courts Have Jurisdiction Over the Proceeding

46. Subsection 9(1) of the CCAA provides that an application for a stay of proceedings under the CCAA may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

47. These criteria are satisfied on the basis that:

(a) the head office of the Transport Companies is located in Sherwood Park, Alberta;

(b) the Transport Companies lease office space and yard space in Sherwood Park, Alberta; and

(c) the Limited Partner and General Partner are corporations incorporated in Alberta with registered offices in Edmonton, Alberta.

48. While Landtran was incorporated in the Northwest Territories, the Transport Companies operate a closely integrated enterprise, and the nerve centre of the operations of the Transport Companies is located in Sherwood Park, Alberta.

49. Alberta Courts therefore have jurisdiction to hear the application.

D. The CCAA Applies to the Corporate Transport Companies

50. The CCAA applies in respect of a "debtor company" if the claims against the debtor company or affiliated debtor companies exceed $5 million.

51. The term "debtor company" is defined in section 2 of the CCAA as:

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

52. Subsection 3(2) of the CCAA provides that companies are affiliated if each of them is controlled by the same person.

CCAA, ss 2(1) & 3(1).

53. Landtran, the General Partner and the Limited Partner are eligible for protection under the CCAA as:

(a) each is a "debtor company"; and

(b) each have claims against them that exceed $5 million;

Additionally, the Applicant is the majority shareholder of all three parties.

54. The term "company" is defined in section 2 of the CCAA as follows:

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies.

55. Each of Landtran, the General Partner and the Limited Partner is a "company" within the meaning of the CCAA because each has assets or does business in Canada and is incorporated under either the Alberta *Business Corporations Act*, RSA 2000, c B-9, in the case of the General Partner and the Limited Partner or the Northwest Territories *Business Corporations Act*, SNWT 1996, c 19, in the case of Landtran.

56. The CCAA lacks a definition of "insolvent". The Court in *Stelco* held that the definition of "insolvent person" under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**") can be applied in the context of a CCAA.

Re Stelco Inc., 2004 CarswellOnt 1211 (ON SCJ Commercial List) [*Stelco*] at paras 26-28.

57. The term "insolvent person" is defined in section 2 of the BIA as:

> *insolvent person* means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

58. Additionally, the Court in *Stelco* held that a company is also insolvent for the purposes of the CCAA if there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity condition or crisis which will result in the company running out of "cash" to pay its debts as they generally become due in the future without the benefits of the protection and procedure authorized by the court.

Stelco at para 40.

59. Each of Landtran, the General Partner and Limited Partner are insolvent on the basis of clauses (a) and (c) of the BIA definition of "insolvent person" and on the basis of the extended definition in *Stelco*.

E. The Relief Sought Should Extend to Ventures West

60. While the CCAA applies to corporations, the relief sought may be extended to limited partnerships at the discretion of the court.

61. Where operations of partnerships are integral and closely related to the operations of the debtor companies, it is well-established that a court in CCAA proceedings has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved.

Lehndorff General Partner Ltd, Re, [1993] O J No 14 [*Lehndorff*] at paras 12, 16-21 [Tab 6].

Canwest Publishing Inc. / Publications Canwest Inc., Re, 2010 ONSC 222 (ON SCJ Commercial List) at paras 33-34[Tab 7].

Cinram International Inc., Re, 2012 ONSC 3767 (ON SCJ Commercial List) at para 64.
Miniso at paras 58-62[Tab 8].

62. The Court in *Re Urbancorp Toronto Management Inc* held that (emphasis added):

> A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Priszm Income Fund, Re* (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in [citations omitted].
>
> I am satisfied that the stay of proceedings provided for in the Initial Order should extend to the related limited partnerships. Each is significantly interrelated to the business of the insolvent applicants as they and their stakeholders, assets (in many cases beneficial ownership of the assets of applicants), and intercompany payables and receivables in particular, form an integral part of the operations of the Urbancorp Group. Although they are not currently technically insolvent, the evidence is that it was reasonably expected at the time of filing that, without the benefit of a stay of proceedings, they will run out of liquidity before the time that would reasonably be required to implement a restructuring.
>
> *Re Urbancorp Toronto Management Inc*, 2016 ONSC 3288 (ON SCJ Commercial List) [*Urbancorp*] at paras 43-44 [emphasis added][Tab 9].

63. Ventures West's operations and finances are closely integrated and intertwined to those of the other Transport Companies, including through intercompany payables and receivables.

64. As mentioned above, the Transport Companies share general management, accounting, human resources, mechanical inspection and maintenance, and sales and marketing functions on an integrated basis.

65. The Limited Partner and General Partner respectively are the limited and general partners of Ventures West.

66. The Transport Companies collectively have approximately 40 employees, 37 of whom are employed by Ventures West.

67. It is appropriate to extend the stay of proceedings to Ventures West on the basis that:

    (a) it is just and reasonable or just and convenient to do so;

    (b) the operations and finances the Transport Companies are so intertwined with Ventures West that not extending the stay will significantly impair the effectiveness of the stay against the Transport Companies; and

(c) Ventures West forms an integral part of the operations of the Transport Companies' businesses and is significantly interrelated to the business of the Transport Companies.

VI RELIEF SOUGHT

68. TIC seeks an initial order in the form attached as Schedule "A" to TIC's Originating Application for, *inter alia,* the following relief:

(a) declaring that the Transport Companies (except for Ventures West) are companies to which the CCAA applies;

(b) extending the same benefit and the same protections and authorizations sought herein in respect of the Transport Companies to Ventures West;

(c) appointing MNP Ltd. as the Monitor;

(d) staying all proceedings, rights and remedies against or in respect of the Transport Companies, their business or property, the Monitor, and the Directors except as otherwise set forth in the Initial Order, until December 9, 2019;

(e) authorizing the Transport Companies to carry on business in a manner consistent with the preservation of their business and property;

(f) authorizing the Transport Companies to pay the reasonable expenses incurred by the Transport Companies in carrying out their business in the ordinary course, including certain expenses incurred prior to the date of the Initial Order;

(g) authorizing the Transport Companies to pay the reasonable fees and disbursements of the Monitor and its counsel, the Transport Companies' professional advisors and legal advisors;

(h) granting a first charge over the assets and property of the Transport Companies in favour of the Monitor, its legal counsel, and the Transport Companies' counsel in respect of their fees and disbursements, to a maximum amount of $100,000; and

(i) such further and other relief as counsel may advise and this Court deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27 DAY OF NOVEMBER, 2019

McMillan LLP

Per: 

Adam Maerov/ Kourtney Rylands

Schedule "A"
(November 1, 2019 CCAA amendments)

— 2019, c. 29, s. 136

- **136** The *Companies' Creditors Arrangement Act* is amended by adding the following after section 11:

- *Relief reasonably necessary*

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

— 2019, c. 29, s. 137

- ***2005, c. 47, s. 128***

137 The portion of subsection 11.02(1) of the Act before paragraph (a) is replaced by the following:

- *Stays, etc. — initial application*

- **11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

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— 2019, c. 29, s. 138

- **138** Section 11.2 of the Act is amended by adding the following after subsection (4):

- *Additional factor — initial application*

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

— 2019, c. 29, s. 139

- **139** The Act is amended by adding the following after section 11.8:

Disclosure of financial information

11.9 (1) A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

Factors to be considered

(2) In deciding whether to make an order, the court is to consider, among other things,

- **(a)** whether the monitor approved the proposed disclosure;
- **(b)** whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and
- **(c)** whether any interested person would be materially prejudiced as a result of the disclosure.

Meaning of economic interest

(3) In this section, ***economic interest*** includes

- **(a)** a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;
- **(b)** the consideration paid for any right or interest, including those referred to in paragraph (a); or
- **(c)** any other prescribed right or interest.

— 2019, c. 29, s. 140

- **140** The Act is amended by adding the following before the heading "Claims" before section 19:

Duty of Good Faith

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

BOOK OF AUTHORITIES

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4. *Companies' Creditors Arrangement Act*, RSC, 1985 c C-36
5. *Re Stelco Inc.*, 2004 CarswellOnt 1211
6. *Lehndorff General Partner Ltd, Re,* [1993] O J No 14
7. *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222
8. *Cinram International Inc., Re*, 2012 ONSC 3767
9. *Re Urbancorp Toronto Management Inc*, 2016 ONSC 3288

Proceedings of the Standing Senate Committee on Banking, Trade and Commerce

Issue No. 56 - Evidence - May 8, 2019

OTTAWA, Wednesday, May 8, 2019

The Standing Senate Committee on Banking, Trade and Commerce met this day at 4:14 p.m. to study the subject matter of those elements contained in Divisions 1, 5 and 26 of Part 4, and in Subdivision A of Division 2 of Part 4 of Bill C-97, An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019, and other measures.

Senator Douglas Black (*Chair*) in the chair.

[*English*]

The Chair: Good afternoon. Welcome to members of the general public who are following today's proceedings of the Standing Senate Committee on Banking, Trade and Commerce, either here in the room or listening via the web.

My name is Doug Black. I am a senator from Alberta and I chair this committee. I will call upon my colleagues to introduce themselves, please, to the witnesses currently empanelled and to the other panels who I know are in the room.

Senator Wetston: Howard Wetston, Ontario.

Senator C. Deacon: Colin Deacon, Nova Scotia.

Senator Duncan: Pat Duncan, Yukon.

[*Translation*]

Senator Dagenais: Jean-Guy Dagenais from Quebec.

Senator Galvez: Rosa Galvez from Quebec.

[*English*]

Senator Frum: Linda Frum, Ontario.

Senator Stewart Olsen: Carolyn Stewart Olsen, New Brunswick.

Senator Marshall: Elizabeth Marshall, Newfoundland and Labrador.

Senator Wallin: Pamela Wallin, Saskatchewan.

[*Translation*]

Senator Verner: Josée Verner from Quebec.

[*English*]

The Chair: We are very ably assisted by our clerk and our analysts.

Today we begin our subject matter examination of all or parts of four divisions of Part 4 of Bill C-97, the Budget Implementation Act, 2019, No. 1.

Honourable senators will know that our committee must report our findings to the Senate by no later than June 6, 2019. We will begin with Subdivision A of Division 1 of Part 4, which deals with amendments to the Bank Act.

Please welcome, from the Department of Finance Canada, Margaret Tepczynska, Director, Strategic Initiatives, Financial Institutions Division; Mary O'Connor, Senior Advisor, Strategic Initiatives, Financial Institutions Division; from the Office of the Superintendent of Financial Institutions Canada, Theresa Hinz, Managing Director, Legislative Policy, Interpretations and Compliance, Regulatory Affairs Division; and from the Canadian Credit Union Association, Jessica Brandon-Jepp, Advocacy and Government Relations Advisor.

My understanding is that this panel, and all subsequent panels with respect to officials, will provide a brief overview based on the material provided to us and then be available for questions.

May we please proceed first with Finance Canada?

Margaret Tepczynska, Director, Strategic Initiatives, Financial Institutions Division, Department of Finance Canada: Thank you, Mr. Chair. Part 4, Division 1, Subdivision A proposes three key technical amendments to the Bank Act in support of the Budget 2019 announcement that legislative amendments would be proposed to modernize corporate governance for federally regulated financial institutions.

The first amendment relates to federal credit unions. Budget 2019 announced that legislative amendments would be proposed to provide members of federal credit unions with more options for voting prior to and at annual general meetings.

Provincial law gives provincial credit union members a wide variety of voting options. Provincial credit unions that transition to the federal framework have asked for a similar variety of voting options.

The improved voting options will enhance means of participation in the voting process at annual general meetings for members. The proposed amendment will make it easier for members of federal credit unions to exercise their right to vote by adding more options — by phone, electronically or in person at a branch — prior to the annual general meeting, in addition to the current way of voting at the meeting and by mail. This amendment was identified by federal credit unions as a means of enhancing the members' participation in the decision-making of federal credit unions.

The next amendments clarify proxy authorities contained in the Bank Act. They are technical changes that clarify the authorities for the form of proxy regulations and update existing language related to the solicitation of proxies to make it consistent with the Canada Business Corporations Act and in line with bijural drafting conventions.

The objective of the proxy-related provisions in the legislation is to ensure that companies provide shareholders with adequate information about their company so that shareholders can exercise their voting rights in an informed manner. To do so, the regulations are set out the form of proxy, the proxy circular and the powers granted in the form to enable a shareholder to appoint a proxy holder to act on their behalf and to receive the necessary information. The Standing Joint Committee for the Scrutiny of Regulations has highlighted the need to update existing, out-of-date references in the form of proxy regulations.

In response, and as a first step, a legislative amendment in the Bank Act is proposed to broaden the authority for regulations that set out the proxy regime. Provisions that define solicitation and the rules surrounding the soliciting shareholder's proxy will be amended as well, to clarify language and make bijural updates. These changes are consistent with the Canada Business Corporations Act definition of solicitation and modern drafting practices.

The department conducted broad consultations in the context of the 2019 financial sector legislative review, as well as targeted consultation with industry on these amendments. The Canadian Credit Union Association and the federal credit unions requested that the Bank Act be amended to permit federal credit union members more voting options.

The department has had an ongoing dialogue with the Standing Joint Committee for the Scrutiny of Regulations in regard to updating the proxy framework for banks and bank holding companies. In February 2019, departmental officials appeared before the joint committee to present a planned approach to update the Bank Act and the form of proxy regulations. The joint committee was supportive of the proposed approach and requested a timely implementation.

This concludes my overview of the provisions. I will now turn to my colleague from the Office of the Superintendent of Financial Institutions Canada to provide her opening remarks.

Theresa Hinz, Managing Director, Legislative Policy, Interpretations and Compliance, Regulatory Affairs Division, Office of the Superintendent of Financial Institutions Canada: Good afternoon, everyone. Thank you for inviting OSFI to appear before the committee. I am joined by my colleague Isabelle Lepage, who is the manager of legislative interpretations. I will be brief today.

As you know, OSFI's role in the federal financial oversight regime is to prudentially regulate and supervise banks and federally regulated credit unions, trust, loan and insurance companies.

My colleagues from the Department of Finance Canada have well explained the amendments under review today. OSFI was consulted on these proposed amendments, which appear to have no prudential impact on the safe and stable operations of federally regulated financial institutions.

Isabelle and I are happy to take any questions you might have. Thank you.

The Chair: Thank you very much. Ms. Brandon-Jepp, please go ahead.

Jessica Brandon-Jepp, Advocacy and Government Relations Advisor, Canadian Credit Union Association: Thank you, Mr. Chairman and all honourable senators on this committee, for the opportunity to speak to you today.

My name is Jessica Brandon-Jepp, and I am the Advocacy and Government Relations Advisor, at the Canadian Credit Union Association. We represent 248 credit unions and caisses populaires outside of Quebec. Collectively, our sector contributes $6.5 billion to Canada's economy, we have 5.8 million members, we employ almost 29,000 Canadians and manage over $225 billion in assets.

In 2018, we donated $62.4 million back to community initiatives and projects across the country, a much higher share of our after-tax income than the large banks. Credit unions are owned by the people who bank with them, and that's what sets us apart. We are only the banking services provider with a physical branch in 395 mostly rural communities across Canada. Despite our smaller size, we have comparable market share to the big five banks in agricultural and small- and medium-sized lending. We lend to small business because we are a small business.

In the Western provinces, credit unions have between 30 and 50 per cent of the market. For example, in Manitoba, one out of every two consumers banks with a credit union.

The important work we do in our communities is the very reason credit unions have been asking the government to modernize some of the outdated provisions within the Bank Act which are obsolete and a barrier to innovation and competition in financial services. We were pleased to see two of our pre-budget recommendations included in Budget 2019. These were changes to federal credit union member voting for AGMs and an elimination of the outdated requirement for federal credit unions to send paper copies of year-end statements to all members each year.

We thank the government for hearing our concerns and for working to address some of our recommendations in Budget 2019. However, we were disappointed that only one of these recommendations pertaining to electronic voting was included in Bill C-97. This means that federal credit unions will have to continue sending out inefficient, costly and environmentally unfriendly paper statements, preventing them from returning the savings that electronic notices would provide back to their communities until at least 2020. One of our federal credit unions estimated that this cost them nearly $1 million annually. That's just one of our credit unions. This money would be much better spent on reinvestment in the credit union or on community programs that our members so generously support.

While the Bank Act only applies to federal credit unions, it is important to note that modernization of outdated provisions eliminates barriers to entry for credit unions considering going federal and sends an important message to provincial regulators, encouraging them to re-examine outdated provisions in their own legislation. Several provinces still have similarly outdated provisions. These recommendations will have an impact not only in the federal sphere but across Canada in terms of increasing competitiveness and innovation within the sector.

With the support of the All-Party Credit Union Caucus and, hopefully, this committee, credit unions remain hopeful that the Parliament elected in October will follow through with a budget measure on paper statements as well as our other recommendations to support innovation and competition within the financial services sector.

Ultimately, policies should encourage competition in financial services in Canada. Currently, our financial sector is not noted for its high levels of consumer choice, and credit unions represent the only real alternative to large banks in Canada. Further policy-driven concentration of financial services in this country is not in the best interests of the consumer or the economy.

Credit unions will continue to advocate for the implementation of the changes that were committed to in

the budget this year, regardless of the outcome of the election. The sector appreciates the support of the All-Party Credit Union Caucus and asks this committee for its support in ensuring that these changes are implemented at the earliest legislative opportunity.

Thank you.

The Chair: Thank you for your presentations. We will now go to questions.

Senator Wetston: The first question I have is on the issues of proxy, proxy circulars and proxy solicitation. I think an amendment in this area is warranted. The issues we often have — and you may know this from securities regulation — are not so much a question of proxies and proxy circulars; it's the proxy machinery that is the challenge. It has been a challenge and under review for several years now to try to clean up the associated problems with proxy machinery — the votes and counting the votes, et cetera — particularly in an environment — which you may be aware of — of "NOBOs and OBOs." The non-objecting beneficial owners versus those beneficial owners who are prepared to declare their ownership.

I recognize it is a bit of a technical question, but I wonder whether you considered it at all with respect to the CBC amendments.

Mary O'Connor, Senior Advisor, Strategic Initiatives, Financial Institutions Division, Department of Finance Canada: Yes, we have been studying the provincial securities regimes closely, as well as the proxy regime under the Canada Business Corporations Act. We're looking at modernizing to follow the best practices of those regimes. We brought in these regulation-making authorities so we would be in a position to make regulations that reflect best practices and catch up with best practices in other jurisdictions.

Senator Wetston: Thank you.

I wanted to follow up on the presentation by Ms. Brandon-Jepp on credit unions. Can you remind me whether, when the CBC amendments occurred last year in Bill C-25, electronic voting was permitted under the CBCA for public companies? I'm asking that question because I don't remember, and I should know the answer.

Ms. Brandon-Jepp: I apologize, Senator Wetston. I also don't recall, but I would be happy to follow up with that information.

Senator Wetston: In any event, your concern is that you are not being given that opportunity. Do you distinguish in any way between shareholders and credit union members, and whether there should be significant differences from the point of view of voting or consent? If there is, what would that difference be, from your perspective?

Ms. Brandon-Jepp: As cooperatives, we do not have shareholders; we have members. Our members are owners of the credit unions. From our perspective, I don't believe that the proxy provision necessarily applies to our context as cooperatives.

Senator Wetston: But shareholders are owners as well.

Ms. Brandon-Jepp: Yes, that's true; however, there is a slightly different process around that.

Senator Wetston: You understand the drift of my question, which was really trying to differentiate any policy approaches because of that different ownership model. You are suggesting they are different, but you are not suggesting why it necessarily needs to be treated differently because of that. That's really my point. And maybe there isn't any difference.

Ms. Brandon-Jepp: I don't believe so.

Senator C. Deacon: Thank you all for being here.

In thinking about the fact that not all of the requests that the Canadian Credit Union Association made were accepted by Finance, it got me to thinking about some work we have been doing lately around open

banking and preparing for digital relationships between banks and their customers. This is banks and their members or effective shareholders. The owners. I'd like to understand the decision-making you went through to choose to make one change and not another, and what you were taking into consideration in that process, if you could?

Ms. Tepczynska: I'm not an expert on opening banking, but I'll be happy to have my colleagues —

Senator C. Deacon: Just in the context of decisions you just made, because it is informative to us.

Ms. Tepczynska: As I mentioned, Budget 2019 announced that legislative proposals would be introduced to keep federal financial institution statutes in line with the changes made to the Canadian Business Corporations Act. That act is the lead statute for corporate governance for business corporations. We consulted with stakeholders on four themes that were introduced in the Canada Business Corporations Act and passed by Parliament in May 2018. Those changes could be introduced at a later date, but the timing of the introduction of the legislation is subject to Minister of Finance approval, parliamentary priorities, parliamentary agenda and government priorities, of course.

Senator C. Deacon: You didn't identify a problem from your standpoint in moving forward, it was just the timing in terms of budget process? I'm trying to understand how you are making decisions as it relates to moving to a more digital relationship in the financial services industry. I think that affects some work we have been deeply involved in, and it is worth our knowing how you make those decisions and how you will empower our banking structures from a digital standpoint going forward in banking organizations.

Ms. Tepczynska: As part of its due diligence, the department consults broadly with industry stakeholders to understand the implications of possible changes going on in the marketplace and how those changes could be introduced in legislation. The Canada Business Corporation Act and the Minister of Innovation, Science and Economic Development has the lead policy for changes to corporate governance, and we leverage that policy direction and leadership when we think about changes to corporate governance for federally regulated financial institutions.

I think the notice and access that we've been talking about, which leverages modern technologies — it is not open banking but it leverages modern technology — is something that we are studying very carefully. It's a conversation that's ongoing because, while corporations may be saving on paper and saving costs, there are some rights that their owners will be giving up. We want to have a more thorough conversation so that we have a balanced approach.

Another point to make is that the notice and access is a provincial regime and it applies to publicly traded institutions. For example, our large banks follow that regime and have been following it successfully for a couple of years now. When we are talking about different ownership regimes, for example, for federal credit unions, we would need to set out clear rules in regulation. To do that we would need to study that carefully and consult.

[*Translation*]

Senator Dagenais: My question is for Ms. Brandon-Jepp. Have you received any explanations on the rejection of your request to be exempted from the obligation to use paper statements? After all, this is 2019, and paper-based communications are not really in line with the environmental values preached by the current government.

[*English*]

Ms. Brandon-Jepp: Yes, that's correct. As I mentioned in my remarks, we feel this is an outdated way of communicating with our members. Currently, we have to send these paper statements out. I might clarify that these paper statements are the year-end reports for the credit union itself, not necessarily the member accounts, but we have to send those out in paper. You as senators know best, but financial statements are often lengthy and complex documents, so there is a large cost, both environmental and fiscal, to sending out these notices. We as credit unions are very concerned with our environmental impact

and are looking for ways that we can constantly improve. This is a great example of something that is relatively easy to modernize that also has an environmental impact.

Senator Duncan: My question is also for Ms. Brandon-Jepp. In your presentation I highlighted a note. You said, " . . . our other recommendations to support innovation and competition within the financial services sector."

Perhaps it would be best to submit this in writing, if you wouldn't mind. Could you provide the committee with the other recommendations that you made that are not included?

Ms. Brandon-Jepp: Yes, absolutely.

[*Translation*]

Senator Galvez: Thank you for your testimony. My question ties in to the one asked by Senator Dagenais. Nowadays, reducing the quantity of paper used is an important issue. However, we cannot ignore the aspect related to computer security.

For example, at some point, Desjardins in Quebec was disrupted by wrongdoers who outright copied its website and managed to establish all kinds of contacts with its clients.

Can you tell us where you are at when it comes to computer security?

[*English*]

Ms. Brandon-Jepp: Thank you for the question.

I can tell you that credit unions take the privacy of their members extremely seriously, and we are committed to ensuring that our members' privacy is protected. I can't speak to the Desjardins example specifically. We do not represent Desjardins, they are not one of our members. However, I can tell you that our members take their members' security very seriously.

This provision we have suggested in terms of providing electronic statements is not to do with our individual member statements for their individual accounts. It would contain no individual member's information. As organizations we are required to provide our year-end financial statements and other documents pertaining to the management of the credit union in paper format to our members. Currently some of our credit unions also post financial statements and other year-end statements online, but this would allow us to not have to send those paper copies in addition, which has a large environmental and fiscal benefit.

Senator Galvez: Among your clients there are people of all ages. I understand young people are very capable with informatics, voting and doing transactions online, but is it still possible for older people to receive their paper and their forms in the old way?

Ms. Brandon-Jepp: Certainly, credit unions are committed to making sure their members stay informed. It is part of those cooperative, democratic values. That would be something that we would be in discussions with the Department of Finance and our regulators on if this provision was put into legislation going forward, but I think that makes sense.

The Chair: I have a quick question for you, Ms. Brandon-Jepp.

In your last paragraph where you are talking about the ongoing activity of the All-Party Credit Union Caucus and your interface with them, are you informing us of that or are you asking us to do something?

Ms. Brandon-Jepp: We are informing. We want to inform this committee that the All-Party Credit Union Caucus supported our recommendations for the modernization of provisions within the Bank Act. The message I want to get across is we did enjoy all-party support, and clearly the government is also supportive as they implemented two of our recommendations in Budget 2019.

We understand there are limitations. In particular, this is an unusual year with the fall election, so there is

limited time. Usually there are multiple BIAs, but in this case, there will likely only be one. We understand that the government has had to prioritize, but, yes.

The Chair: I take from that that you've made your best effort, you got some changes, you're satisfied with that, you're going to go back at it after the election and you're simply informing us of that.

Ms. Brandon-Jepp: Yes, and we would love this committee's support and the Senate, as the constant presence in our Parliament, to ensure that whichever Parliament is elected in the fall that they follow through with that paper statement change that was in the budget.

Senator Stewart Olsen: Thank you for that. My question is for the co-ops. Following on Senator Galvez's question, I understand that going totally paperless is a very good thing for the credit unions, but when people sign up with you would you consider — as I think you should — providing a paper copy if members don't want their statements by email? Would you put a checkmark or a box for people such as seniors and people who aren't computer savvy and don't have ready access? I wonder if you would consider that.

Ms. Brandon-Jepp: We would certainly be open to that. The large majority of our members are older people, and we recognize the importance of the bricks and mortar. As I mentioned, we have 395 bricks and mortar locations where we're the only financial services provider in that community. We are very much committed to those individuals who remain interested in that form of communication.

Senator Stewart Olsen: Thank you.

The Chair: I have the privilege of thanking you all for being here today. That was very instructive to us. We needed to understand, and we now have a better understanding.

This next panel will concern Subdivision B of Division 1 of Part 4, which deals with amendments to the Canadian Payments Act. Please welcome, from the Department of Finance Canada, Julie Trepanier, Director, Payments Policy; William Gibson, Analyst, Payments Policy; and from Payments Canada, Anne Butler, Chief Legal Officer and Head of Research and Policy.

We will begin with Finance Canada and their brief opening remarks, followed by Payments Canada and then questions.

Please proceed.

Julie Trepanier, Director, Payments Policy, Department of Finance Canada: Thank you, chair. The Canadian Payments Act prescribes Payments Canada's mandate membership and governance framework. Part 4 , Division 1, Subdivision B, makes technical amendments to the Canadian Payments Act in order to allow elected directors to be elected for two additional three-year terms, extend the term of the chair and deputy chair of the board from two to three years and add an overall limit of six years.

[*Translation*]

It ensures the compensation of Stakeholder Advisory Committee members who are subject to administrative regulations. For example, some members of the Stakeholder Advisory Committee, such as consumer groups, are facing financial constraints that can hinder their participation. Those technical changes were announced in the 2019 budget and are a follow-up to a legislative review of the Canadian Payments Act conducted by the government in February 2019.

[*English*]

I will now turn to Anne Butler from Payments Canada.

Anne Butler, Chief Legal Officer and Head of Research and Policy, Payments Canada: Thank you for inviting me here today to provide input on the amendments to the Canadian Payments Act. My name is Anne Butler, Chief Legal Officer and Head of Research and Policy at Payments Canada.

I'd like to take a few moments to provide some background on Payments Canada and its role in the

Canadian financial institution space. Payments Canada is the business name of the Canadian Payments Association as described in the Canadian Payments Act we are talking about today. While Payments Canada is a little-known entity to most Canadians, it plays an essential role in the economy and the day-to-day operations of financial institutions and businesses across the country. In 2018, Payments Canada cleared approximately 8 billion payments with a total value of $50 trillion, averaging $210 billion each day.

As a public purpose corporation, Canada Payments underpins the Canadian financial system and economy by owning and operating Canada's payment clearing and settlement infrastructure, including associated systems, bylaws, rules and standards.

We are guided by our mandate and the public policy objectives of safety and soundness, efficiency of the Canadian clearing and settlement systems, and these objectives are enshrined in the Canadian Payments Act. We place the highest priority on acting in the best interests of Canadians by ensuring that financial transactions are carried out safely and securely each day.

Payments Canada has a board of directors that is comprised of five member directors representing key financial institution groups, seven independent directors including the chair, and Payments Canada's chief executive officer. We also have two important advisory councils: the Stakeholder Advisory Council and the Member Advisory Council. These councils are an important aspect of the governance structure, providing advice and counsel to the board on payments, clearing and settlement matters.

Payments Canada is currently undergoing an ambitious modernization effort to replace its two legacy systems, payment clearing and settlement systems, with three new systems to handle high value, batch retail payments and real-time retail payments for Canada. These systems will be underpinned by modern policy and legal frameworks.

The amendments to the Canadian Payments Act outlined in Bill C-97 propose two important areas of change to our governance structure: namely, greater flexibility to the terms of our board members, the chair and vice-chair, and adjustments to the level of prescription on the Stakeholder Advisory Council. These are important and necessary changes that will further Payments Canada's ability to fulfill its mandate and deliver on the modernization initiative.

First, with respect to board governance, Payments Canada is unique in several ways, including the complexity of the industry, its enabling legislation, its oversight framework, public policy objectives and the scope of our mandate. We are both a rule-making body and an operator of systemically important and prominent payment systems.

Since 2015, all of this has been carried out under the guidance of a majority independent board supported by the expertise from industry and advisory councils. The complexity of our environment makes the recruiting and on-boarding of directors — and especially independent ones — a critical factor for ensuring consistent and effective governance to enable Payments Canada to fulfill our mandate and successfully deliver on our modernization initiative.

Existing director term limits create a barrier to the flexible board succession planning needed to enable the proper mix of expertise and familiarity with multi-year strategic initiatives to support strong governance and strategic oversight. The proposal to permit directors to potentially serve an additional three-year term provides flexibility to the board to retain experienced directors, as may be appropriate, to support knowledge transition to successors.

For instance, this would enable a director to join the board, serve for a three-year period and then be ready to step into the position of chair with the potential to serve for one or two more terms. This cannot be achieved under the current legislation.

These amendments are consistent with best practices among similar organizations and will allow for flexible planning on board succession, ensuring there is sufficient knowledge on the board, providing greater options to manage potential knowledge gaps in situations where a director leaves early or to provide continuity of oversight for the duration of lengthy critical projects.

There is another change related to the chair terms which I would describe more as administrative in nature. The change proposes that the terms of the chair and deputy chair will provide efficiency in our governance process by extending the chair and deputy chair limits from the potential of two two-year terms, for instance, or two three-year terms. By extending it to two three-year terms, it aligns it with the director's actual term on the board, and we will not have to participate in four renewals to have some chair serve for six years on the board. It's very much an administrative change to the term limits of the board chair and vice-chair.

I'd like to turn now to the Stakeholder Advisory Council-related provisions. This council is an important vehicle to our board governance. We want to ensure that the Stakeholder Advisory Council retains a strong legal foundation, is effective and can evolve in step with the changing payments ecosystem.

The changes to the legislation will reduce the level of prescriptiveness of this council in three ways: There will no longer be a requirement for the board to appoint up to two directors on the council, there will no longer be a limit on the number of persons appointed to the council, and it will remove a prohibition that is in the legislation that prevents us from paying members of the council that fall within certain classes that could be prescribed by bylaws.

These changes are welcomed by Payments Canada, as they enable a more flexible approach to the representation of our broad ecosystem on the Stakeholder Advisory Council. In particular, the removal of the prohibition on remuneration of council members will give the board the ability to attract representation on the council from those industry groups with lesser financial means who otherwise may not be able to participate.

Specifically, having greater flexibility to develop and employ a transparent remuneration policy will help ensure that we can meet our composition requirements and attract consumer expertise on the council.

Having less prescription in the act will give Payments Canada greater flexibility to make the necessary changes to the SAC's structure and role over time as our ecosystem evolves. At the same time, maintaining key SAC provisions in Payments Canada's bylaws will assure ministerial oversight and a strong legal foundation.

Finally, I would like to say we've been working very closely with the Department of Finance as they review our legislation and expect that possible future changes may also be proposed. The retail oversight framework was announced in Budget 2019 and will be a key enabler to broader risk-based access to Canada's retail payments ecosystem.

We look forward to working collaboratively with the Department of Finance on the implications of this new framework, on our membership and the changes to our legislation that will be required in the future to support this important initiative.

I'd like to thank you very much for inviting us here to provide evidence in respect of the changes to the Canadian Payments Act, and I welcome any questions you might have.

Senator Stewart Olsen: Thank you for your presentations. I must confess that I kind of glossed over this at first, and reread it a few times. I began to wonder what's happening in actuality here.

Most modernization plans downsize the number of directors, et cetera. I'm pretty sure this one was set up this way so that you would have turnover and avoid ingrained people on these boards. What I'm seeing here is the building of a bureaucracy, I think. These people are getting longer terms and more and more say. I know you didn't suggest this.

Further, the changes allow the Stakeholder Advisory Council to increase in size. I have to make the comment that this Liberal government is a wonderful creator of advisory boards. It's a great way to reward people and have people come on. So my eyebrows rise when I see that we're now going to pay them.

Who makes the decision as to who sits on the advisory board? What was the impetus for increasing the terms of directors? Where did that actually come from? Where does the money come to pay the advisory

board members?

Ms. Butler: I will take those starting with board size. The size of the board actually shrunk in 2015 to a smaller board of 13. It was quite a bit larger prior to that date. That was the same time that the majority independent board was put in place. Previously, the board was primarily member financial institution representatives, with some appointments by the Crown.

The board structure has been in place now for about four years. There is no proposal to increase the size of the board at this time, and it is consistent with current practices in terms of trying to keep a smaller board.

We are also a member-based organization, and so five of those seats, importantly, represent subject-matter expertise and industry experience from members who are divided between financial institutions of different sizes and makeup within the group. So these three seats are associated with direct participants in our systems and two with indirect participants.

If I could move now to the legislative change to provide a potential additional term. The impetus behind that comes from Payments Canada, its board and management team. We actually asked for a cap of 10-year terms in our first proposal, although what has been recommended in this legislation is certainly satisfactory to us.

The impetus behind that represents the amount of effort and the importance of quality directors who understand a very complex business. Bringing on new, independent directors in 2015, the learning curve to understanding the broad business and engage in a program that is a multi-year modernization initiative not intended to be completed until a post-2022 time horizon is long. The board and the Governance Committee of the board is of the view that it is helpful to have the optionality if, for instance, there is expertise in the audit function or risk-management function at the board level, somebody with deep expertise who would be valuable to retain, to keep that individual director for an additional three years. That is something quite desirable for the board from a governance perspective.

The other option I gave you was around being able to on-board directors and have them serve sufficient time to be a very effective chair. That is driven by the Governance Committee of Payments Canada's board of directors and the board itself that supports that. It is supported broadly by both our Member Advisory Council, which is a 20-person council representing our members, and our Stakeholder Advisory Council, which represents the users of payment systems, so individual consumers, businesses and payment service providers.

Senator Stewart Olsen: Who pays?

Ms. Butler: Who pays? Our budget is entirely funded by member institutions.

If there was a decision, for instance, to talk about the payment of the Stakeholder Advisory Council, the Stakeholder Advisory Council has been in the legislation for decades. They are an important policy tool to ensure that the voices of the users of payment systems are heard as we are considering rules, bylaws and changes that would impact users.

The payment of an individual representative on that council, again, is initiated from the management team and board of Payments Canada as a recommendation. One of biggest challenges we have in properly getting a representative group at the Stakeholder Advisory Council is consumer representation.

Senator Stewart Olsen: I can understand why, I just want to know who pays. So who pays?

Ms. Butler: Payments Canada would cut the cheque or pay electronically, but the funding is coming from member financial institutions in Canada.

Senator Stewart Olsen: Thank you.

Senator Wallin: To reiterate, it is not tax dollars directly?

Ms. Butler: It is not tax dollars.

Senator Wallin: Thirteen is a large board, but I guess that was the decision. To make sure I have this correctly, there is no limit on the number of members who can participate in the advisory councils?

Ms. Butler: Currently, under the legislation, there is a limit of 20. What is proposed is that the limit be removed and set by bylaw rather than in the legislation.

Senator Wallin: There would be a limit at some point?

Ms. Butler: The intention would be to have it in the bylaws, yes.

Senator Wallin: You also said as part of your modernization process you are rethinking the level of prescription allowed or that ability given to the advisory council. Can you tell me what that means?

Ms. Butler: For instance, in the legislation right now there is the requirement that there be two directors appointed to the council, so two of the advisory council seats are actually taken by members of the board of directors. There is a desire to make sure that, moving forward, a more flexible tool, like a bylaw, is used to govern what kind of representation should sit on the Stakeholder Advisory Council.

One of the reasons for this is the payments service provider, payments technology and payments products that are available to consumers is a rapidly changing environment. A bylaw is a more flexible tool to respond to developments and adjust membership of the council over time to make sure you have a broad representation of the payments ecosystem that is non-member, so non-financial institution.

Senator Wallin: That would be a board decision through a bylaw?

Ms. Butler: Bylaws of the organization go to the boards of directors and then are actually submitted the Department of Finance and ultimately receive ministerial approval. They would be under the scrutiny of the regulatory structures here.

Senator Wallin: Sorry, but the board would then just say, "We want to go to 30 members and we need 10 people from the sector and five from there." Is there that level of justification?

Ms. Trepanier: This is just a scenario, but in any circumstances for bylaws we would engage with Payments Canada and Finance Canada and discuss the rationale for the proposal and then submit it for the minister's approval.

Senator Wallin: But once the bylaw is in place it becomes quite subjective, right?

Ms. Trepanier: The bylaws are pre-published in the *Canada Gazette* for comments.

Senator Wallin: The bylaws wouldn't say that you need to have five people from credit unions and six people from the community at large and somebody from the school board. It wouldn't get to that level of description, so the discretion is actually with the board chair or the board? I'm just trying to sort that out.

William Gibson, Analyst, Payments Policy, Department of Finance Canada: Right now there is minimum set out for certain groups of stakeholders on the council to ensure adequate representation of those groups, but it's a minimum to retain flexibility to adjust as needed.

Senator Wallin: Okay. I'll just put a tiny flag beside that one, but go ahead.

Senator Wetston: I think I can appreciate why you're making the governance changes. I suspect you're doing it to try and keep up with the context of what's changing at Payments Canada. I'm kind of interested in what's changing at Payments Canada, and also maybe — and I realize this is a little off topic — how is the modernization program going?

Ms. Butler: It's a great question, and an opportunity to talk about the modernization program.

What is changing at Payments Canada? As I said, we have a multi-year modernization initiative under way. The first and biggest of those is the replacement of the systemically important payments system in

Canada, currently known as the LVTS, or Large Value Transfer System. I'm pleased to say we have recently signed with technology providers for the replacement of that platform on new technology, with the plan that that be implemented in 2021.

It's a very big change. All financial institutions in the country, through the direct participants, are connected to that system. It's the way money is moved between the financial institutions in Canada every day and between the financial institutions and the Bank of Canada. It's a very important system where we have all our member financial institutions lined up to support and move together to make that change. It's a big change.

The second big pillar of our modernization initiative is to support and implement what we call the Real-time Rail in Canada, so a faster payments rail for Canada that will enable payments that move in real time and settle with finality in real time. That is a project still under way. The actual plans for delivery on that are not yet determined, but it is a very important part. Some of the things I have spoken about today are critical to setting that up, including what will happen moving forward with the retail payments oversight framework that is also on the agenda of the government.

As we move forward with real-time payments in Canada and the planned regulation of other players in the payments space, we would anticipate that there will also be membership changes to Payments Canada in the future that will enable other forms of participants in the payments systems that are not just financial institutions, but payment service providers, for example. This is an important pillar of our modernization.

The third part of that is the batch payment system in Canada, which does the automated funds transfer systems and things like the debit system and all of the EDI or electronic deposit transactions. They are all cleared and settled through that system. Again, that one will be modernized as part of this program and has already undergone significant rule changes that have provided more safety and soundness with respect to that so that now transactions moving through that are collateralized with the Bank of Canada.

Those are the three of the big pillars and where they are in status, senator.

Senator Tkachuk: I want to congratulate you. I think we have one of the finest clearance systems in the world. All you have to do is go south of the border to find out how good we really are.

We are broadcast on TV, and there might be two or three people listening who have no idea what we're talking about. When you say "stakeholders," could you outline who the stakeholders are? Then I will have a number of questions.

Mr. Gibson: With respect to the Stakeholder Advisory Council types of stakeholders that are identified from representation, they include payment service providers and consumer groups.

Senator Tkachuk: Who would they be? Who are payment service providers?

Mr. Gibson: Payment service providers are the entities who initiate cleared payments; for example, payment card networks. Visa and MasterCard are examples of payment service providers.

Senator Tkachuk: At page 5 you talk about the changes on the council and the board. It is probably a really good idea to get it out of the legislation and put it into the bylaws. It would be easier to manipulate what you have to do. But you mention here, " . . . attract representation on the Council from those industry groups with lesser financial means who otherwise may not be able to participate." Who would that be?

Ms. Butler: I can give a real example of some of the challenges we've had with the Stakeholders Advisory Council over the past couple of years. Currently we have under the requirements, two consumer representatives are a mandatory part of the council. It's a significant commitment to be part of the advisory council. It is very difficult to find consumer representatives who are able to dedicate the kind of time that it requires to be on the council because they do not have funding for that.

That is the primary driver for the ask we have submitted to the department. That forms the basis of what is in the proposed legislation is that flexibility. Certainly, consumers, for sure, are a challenge for us. It's

possible there may be others in the future, but that is the main issue we are facing now.

Senator Tkachuk: How do you find them? Are they consumer groups that you go to see or do you pick somebody off the street?

Ms. Butler: There are consumer groups.

Senator Tkachuk: Like who?

Ms. Butler: The Consumers Council of Canada would be an example.

Senator Tkachuk: Those kinds of people may not have the money or the time, or is it a mixture of both?

Ms. Butler: Probably a mixture of both, yes.

Senator Tkachuk: When you talk about the two-year and three-year appointments, on the two-year appointments, can't the board just renew itself? Who suggests it? Do you only get two years and then you are gone and you need a new body, or can you renew the two years and can you renew the three years? What exists now?

Ms. Butler: We are talking about the chair and vice-chair appointments.

Senator Tkachuk: The directors, you said, are two-year appointments.

Ms. Butler: Directors are appointed for three years and can be renewed for a second term. What is being proposed in the legislation is the potential for a third term, should that be advisable.

For the chairs, it's quite simply trying to line up their actual term. They could be appointed for a term as chair for the same term they are a director so that we don't have to do it multiple times during their tenure.

Senator Tkachuk: Are the board people like the advisory council? Are they taken from the service provider, so you would have a representative from Visa, for example? Who would be on the board?

Ms. Butler: Seven members of our board are independent and chosen from the pool of candidates for directorship with experiences that would be valuable to the organization and that have met the strict independence criteria set out in the bylaws and the regulation under the Canadian Payments Act.

Senator Tkachuk: Who appoints them?

Ms. Butler: They are elected by the membership.

Senator Tkachuk: Okay. Thank you very much.

Senator C. Deacon: Thanks very much to our panel.

I want to get a further sense of how your business is changing. I think we all feel the changes going on around us. I was looking at the data in terms of the fact that cheques and paper are dropping in use every year by as much as electronic and other digital fund transfers are growing. It makes sense. That must change, I would expect. Does that reflect a change in your cost structure per transaction as these changes occur?

Ms. Butler: Yes, it would ultimately result in changes to cost structure over time. As we are planning the implementation of a new payment system, that would potentially have migration of payment streams from the current ACSS on to the Real-time Rail. There would be changes in cost structure as well, over time.

Senator C. Deacon: We will probably see an acceleration as we go forward in this change. You mentioned that your costs are borne as a fee for service by the member organizations, which I assume are primarily chartered banks?

Ms. Butler: Yes, there are banks and other financial institutions that can be members.

Senator C. Deacon: They would, in turn, pass that on to consumers?

Ms. Butler: Certainly the banks would recover their costs through the structures they use in pricing their products.

Senator C. Deacon: I'm interested in how your governance structure takes into consideration how you price that as you move forward. Those organizations, perhaps new entrants into the market, who come with a dramatically lower cost in terms of what their membership and volume might incur at Payments Canada.

How do we have confidence that the directors and advisory board members will appreciate and push for as transparent a pricing scheme as possible that really rewards those financial organizations that are highly efficient with different pricing from those who are laggards in the shifts they are making or encouraging through their client structure?

Ms. Butler: Pricing is something that is very important to make sure we are being held to being efficient, as the statute requires, and that we consider efficiency in what we do.

The cost of developing the new systems is actually being priced in a way to enable participants in the new system to fund the build that happens to support the new system, which should be encouraged. This is the kind of approach to pricing you were talking about. It's part of getting in place more modern and efficient systems and enables a reduction in price over time, relative to the costs for those members.

Senator C. Deacon: Tell me specifically, because it sounds like you are really trying to work to encourage member organizations to become increasingly efficient, as you do. How can you give us confidence that the board membership will reflect the leadership of those organizations that are demonstrating the most client-centric approach to delivering efficient and effective banking services across the country and maintaining this great reputation that Senator Tkachuk mentioned, and the great results that we can be proud of in Canada?

As we move forward, I'm thinking about making sure there is the opportunity for disruptive new entrants to become a part of your organization or access your services in a way that benefits Canadians and, perhaps, globally, so that we have the kinds of board members being brought into the system who are not protecting the status quo but really continuing to push the organization and the banking industry to keep getting better. You are right at the core of it. You have a unique position in our banking system.

Ms. Butler: Yes, it's a very exciting time to be at our organization. There is a governance and nominating committee of the board, which is one the requirements enshrined in 2015. If you take a look at the current makeup of our board of directors, as an example, you can see from the makeup of the independents, even, that there is experience from the financial technology sector within the independent directors on the board. You will also see, with respect to the member directors on the board, that one of our directors, for instance, is with a financial institution that is a non-bricks-and-mortar bank.

With five member director seats that will rotate with some frequency, you will always have some shift in who is in those seats, but you will see evidence already that we and the board are considering that as they are constituting their board and looking at the skill sets of directors and the knowledge base needed for that. I would expect that the governance committee and the board would continue to take that approach.

To your second question around the future, I signalled to some of the expected changes that will follow. I would expect that either myself or someone else will be here in the near future talking about future changes to our legislation that are tied closely to the retail payments oversight regime that the Department of Finance is planning.

That is also tied closely to the modernization initiative that we are calling Real-time Rail. The expectation is that system will be the enabler of access to our systems in the future when there are new entrants who will be allowed to become members. Right now, under our legislation, our membership is constrained to prudentially regulated financial institutions. We have every expectation that in the future, as part of that retail oversights framework, there will be an opening up of access to our systems and that our governance

will likely need to be changed again to reflect that.

But it is also one the drivers for asking for more flexibility around the Stakeholder Advisory Council because, over time, who constitutes a member and a stakeholder may change. Some payment service providers may be lining up to become members in another iteration of this legislation, and our Stakeholder Advisory Council makeup would likely change to reflect more users and fewer service providers over time.

This is a very important opportunity for the ecosystem to be able to stand up new technology and new access to enable that in the future.

The Chair: I would remind senators that we are now over time with this panel, so we are going to be as focused as we can.

[*Translation*]

Senator Galvez: Thank you very much for your testimony and your answers. I will also come back a bit to issues raised by my colleagues. I am trying to align the issue of modernization you described with these three parts, which certainly indicate that the focus is on accelerating transactions and using modernization in IT. So I am trying to align that ongoing modernization with the need to make governance even more rigid by increasing the time and the number of directors.

[*English*]

It would be interesting for this committee to hear from some of the directors. I think it is interesting to ask the directors about the modernization that is going on.

By extending the term of these directors — and you have said that things change rapidly and that this modernization is mostly on the informatics in the software and online, how can you justify that? I'm curious to know what is the salary of one of these directors?

Ms. Butler: First, I'll take the question around why there should be longer terms, given the pace of change. Our belief, and the belief of the board, looking at best practices in terms of flexibility, is not to say that each director should stay in the chair as a director for nine years, but that typically good governance practices provide some flexibility, for instance, to enable a director to stay for an additional period of time when we are implementing the systemically important payment system for Canada. The directors who are in the seats during that transition period, and the continuity of those directors, can be valuable in overseeing management and working with industries through what is a very significant change. It has to be a big bang cutover with all of the industry going together to move on to the new system. That's an example of where having the flexibility to have continuity — for example, it might be a director who is especially strong in supervising risk management or strong in the audit area — and to keep, for instance, the chair for an additional term while training or bringing on the new chair to step into that role is important. That's the flexibility being sought with the extension of time.

Senator Marshall: The board reports to the Minister of Finance, does it?

Ms. Butler: The board is a majority independent board. It has accountabilities to the Minister of Finance and we have to publish a plan every year that is approved by the Minister of Finance.

Senator Marshall: Are the members of board Governor-in-Council appointments?

Ms. Butler: No, they are not.

Senator Marshall: Who appoints them?

Ms. Butler: They are elected by the members. All the directors are elected by the members of organization. It's a membership organization, it is not a Crown corporation.

Senator Marshall: The Stakeholder Advisory Council reports to the board.

Ms. Butler: Advises or reports to the board, yes.

Senator Marshall: But those members on the advisory committee are appointed by the board in consultation with the minister.

Ms. Butler: That is correct.

Senator Marshall: If the minister has no involvement in the appointment of the board, why would the minister have involvement with the Stakeholder Advisory Council? It seems peculiar.

Ms. Butler: I'm happy to express an opinion on that, but I'm conscious that that might be Ms. Trepanier's bailiwick. My interpretation of that is that the Stakeholder Advisory Council has been an important instrument of public policy for many years for the Minister of Finance, and for an organization that was member controlled for a long time to ensure that the voice of stakeholders form part of the decision-making of the organization. It has continued, subsequent to the changes in the governance structure, for that same reason.

Senator Marshall: Are the members of the Stakeholders Advisory Council Governor-in-Council appointments?

Ms. Butler: No, they are not.

Senator Marshall: That is a very peculiar reporting structure.

Senator Wetston: What is the average daily value of the LVTFs in Canada these days?

Ms. Butler: I'm afraid you are going to catch me not remembering my numbers.

Senator Wetston: Close?

Ms. Butler: Well, I only have the combined ACSS and LVTS numbers. Daily, that's $210 billion.

Senator Wetston: LVTS would be the larger part?

Ms. Butler: That's correct.

Senator C. Deacon: Purely out of curiosity, what are the opportunities for this organization to eventually export its expertise into other jurisdictions and have it used as a clearance and financial system backbone in other locations or jurisdictions?

Ms. Butler: The technology, you mean?

Senator C. Deacon: Yes.

Ms. Butler: Besides the technology, we are also a policy, rule and rule and standards shop. That's a key part of what we do besides run the technology. We already do that through collaboration with international organizations around the world. That's something we are already active in.

There is always the potential for technology, but it is not a focus for us. With the high value payment system, we are actually using the leading technology provider in that space. We are using their technology because it's the best-in-class technology for running a high value payment system.

Senator C. Deacon: Really this is a domestic business entirely.

Ms. Butler: It is. We are a utility for the financial system.

The Chair: Panel, thank you very much for being here. I think we learned more than we thought we were going to learn and I suspect you felt you were on the panel a little longer than you were going to be. We are glad we got through this. Clearer understanding for us all.

Honourable senators, this panel will deal with Subdivision A of Division 2 of Part 4, dealing with the Canada Business Corporations Act.

Please welcome, from Innovation, Science and Economic Development Canada, Mark Schaan, Director

General, Marketplace Framework Policy Branch; Darryl Patterson, Director, Corporate, Insolvency and Competition Directorate, Marketplace Framework Policy Branch; and Ian Disend, Senior Policy Analyst, Marketplace Framework Policy Branch.

Mr. Schaan, would you please proceed?

[*Translation*]

Mark Schaan, Director General, Marketplace Framework Policy Branch, Innovation, Science and Economic Development Canada: Thank you, Mr. Chair. I will begin with a bit of context. In December 2017, federal, provincial and territorial Ministers of Finance concluded an agreement in principle according to which, as the first step, they would make amendments to their legislation on corporations in order to impose on them the obligation to keep accurate and up-to-date information on their beneficial owners. Budget 2018 made official the federal government's role in the implementation of that plan, and amendments to the Canada Business Corporation Act, CBCA, were made through the Budget Implementation Act — Bill C-86 — on December 13, 2018, to impose on private corporations incorporated under the CBCA the requirement to keep a register of the individuals who control them, defined in the CBCA as "individuals with significant control," or ISC, such as beneficial owners.

[*English*]

This change builds on a change that we made in Budget 2018 by simply amending the act further to specify who would be able to access this information as a first measure to conform with our obligations to allow access for competent authorities.

The changes essentially specify that, on request by a specified investigative body, the corporation will be required to keep a register and shall, as soon as feasible after a request is made, provide a copy of the register or information from it in the manner requested.

This amendment further specifies which investigative bodies in question we mean, which are police and tax authorities, and then we have set out a number of safeguards for this.

First of all, we've made sure that we've indicated that the investigative body can only make such a request if there are reasonable grounds to suspect that the information would be relevant to an investigation of one of the offences set out in the schedule. That is the schedule related to money laundering, terrorist financing and tax evasion, as per the nature of the statute.

Similarly, we've also indicated that investigative bodies must keep records when they use this requested power, and that investigative bodies must file an annual report to the director of Corporations Canada on aggregate use of the request power.

We believe these safeguards will allow for competent authorities to more easily access the registry of significant control of beneficial owners, while at the same time ensuring those legitimate investors that there is not undue use of this tool to be able to potentially understand or gain access to the information about ownership unnecessarily.

That's the provision we have before you today. We are happy to take your questions.

Senator Stewart Olsen: Thank you for coming. Has this division been run by the Privacy Commissioner, and what did the Privacy Commissioner have to say?

Mr. Schaan: There have been discussions about the privacy nature of this information. The feedback has been that the ownership information about control is administrative information that's deemed to be in the interests of the government, subject to the administration of corporations, and that that information is well and truly good to be made public.

Senator Stewart Olsen: Has it been run by the Privacy Commissioner?

Mr. Schaan: Yes.

Senator Stewart Olsen: And he's okay with this?

Mr. Schaan: Yes. The Privacy Commissioner always has the capacity to re-examine laws, but our initial assessment was there were no problems with this particular statute.

Senator Stewart Olsen: Even when the CRA can access this information as well?

Mr. Schaan: The CRA obviously has information that is already available to them on the filing of tax information from corporations. This is simply an additional power to be able to understand the beneficial owner of the actual share.

Senator Stewart Olsen: Thank you.

The Chair: Very interesting line of questioning.

Senator Wallin: We should come back to that for a moment, because we know the CRA has access to tax information and all of that. That's different from whether they have access to information that was gathered on reasonable grounds.

Mr. Schaan: No, what's important to note here is that there is already an obligation under the Canada Business Corporations Act for corporations to keep a registry of their shareholders. That information was always available to other shareholders, to the director of Corporations Canada and to law enforcement under warrant.

What we required under the Budget 2018 amendments to the Canada Business Corporations Act was for corporations to make reasonable attempts to seek out the beneficial owner of that share and to make that information available. Where there is reasonable suspicion of linkage to a particular law enforcement penalty or investigation, law enforcement will be able to gain access to that registry of significant control, which simply indicates that those individuals are listed as the ultimate owner of a share.

Senator Wallin: What would trigger them to do that?

Mr. Schaan: Likely suspicion of an offence related to money laundering, terrorist financing or tax evasion.

Senator Wallin: Or an indication from the data that they had access to?

Mr. Schaan: No, they can't access the information until such point as they have reasonable suspicion.

Senator Wallin: A compilation of numbers, that would just say, "We had 200 investigations this year," and you're just using raw numbers to determine if this is overuse or underuse of the system?

Mr. Schaan: Investigative bodies must keep records when they use the request power, including the name of the corporation, the reasonable grounds, what was requested, the date and manner of the service, what was received and anything prescribed that we can prescribe in regulation. What investigative bodies must file is an annual report to the director of Corporations Canada on aggregate use of the power, which is the number of requests broken down by province and territory and then for RCMP or CRA.

Senator Wallin: But not by substance?

Mr. Schaan: Not by substance.

Senator Wallin: Thank you.

Senator Wetston: I understand the line of your thinking on what's done here, since we worked on Bill C-25 when we imposed these original provisions, but let's distinguish between this and publicly traded companies.

This is really meant for the private companies. It applies to public companies, but for different reasons it might, only because of the fact that over 10 per cent you have to disclose, and we know that. This is really meant for the private companies and the continuation of what was done in Bill C-25. Is that correct?

Mr. Schaan: The changes were actually not in Bill C-25. They were in the Budget Implementation Act, 2018, No. 2, Bill C-86.

Senator Wetston: That was the budget.

Mr. Schaan: That's correct. This is subject only to privately held corporations because, as you indicated, publicly traded corporations are subject to other rules. This is mimicked though, it's worth noting, in the FINTRAC obligations of all these companies. This is a completion of what we believe to be belts and suspenders. Corporations are already required to provide this information about the beneficial owners of their organizations to the financial institution with which they do business if that institution is regulated by FINTRAC.

We are simply creating a mechanism by which those corporations can both have examples of how to keep that information, because right now that doesn't necessarily exist under FINTRAC. Moreover, for those who don't bank in Canada, which you can imagine in statute aimed at ending money laundering, terrorist financing and tax evasion, there would be good reason to believe that there may be organizations that are actually incorporated that don't bank in Canada that we can potentially allow competent authorities to be able to access this information.

Senator Wetston: One way to address this issue — I can see the value of it, obviously, particularly for law enforcement — is the way they did it in the U.K. Why not just have a public registry, Mr. Schaan?

Mr. Schaan: As we noted when we came before this committee with Part 1 — we consider this to be 1.5 — we are doing this in lockstep with the provinces and territories. In Canada, where you incorporate is a choice. It's not actually determined by what sector or any other zone. So long as we have inconsistent regulations between us and other incorporating bodies in a zone where we're trying to set a floor of minimum standards, we need do it in lockstep and together. What ministers of finance between provinces, territories, and the federal government were able to achieve was a two-part phase.

First, let's have them hold the information. Second, let's give regulated access to competent authorities. They very clearly indicated that if they're subject only to a warrant, that's essentially a billboard to maleficent actors who potentially know there is something coming because there is a warrant. This allows them competent authorities where they have grounds of suspicion and a likely investigation to access it.

The second phase is to work with the provinces and territories and say, " Okay where do we go next? Should we have some sort of central registry of all of this information related to significant control? Who should hold it? Should it be related to corporate registries or should it be separate? And who should have access to it?"

Senator Wetston: My only follow-up comment would be if that were to occur, it would be a much more expeditious way to follow the money than this would allow.

Mr. Schaan: It's true, and in the consultations that we had, we mostly focused on Part 1 and Part 1.5, but there are significant concerns from people about a publicly accessible registry. There are high-net-worth individuals who make very prudent investments and aren't interested in sharing their investment strategies with the rest of Canada, who may decide to follow up and push companies in ways that they wouldn't. Moreover, there are some others out there who believe that there would be a significant challenge to Canada, as a relatively small, open trading economy, to having that information.

But that said, that's all for us to work out with the provinces and territories as we contemplate phase 2.

The Chair: Senator Wetston, that is an interesting segue to your ongoing concern about beneficial ownership.

Senator Wetston: It's not just my concern; it's Mr. Schaan's as well.

The Chair: I think it is many people's concern. Panel, thank you very much.

The next panel will concern Division 5 of Part 4, which amends the Bankruptcy and Insolvency Act, the

Companies' Creditors Arrangement Act, the Canada Business Corporations Act and the Pension Benefits Standards Act, 1985.

Please welcome, from the Department of Finance, Kathy Wyre, Acting Director, Pensions Policy; Oliver Kanter, Economist, Pensions Policy. From Innovation, Science and Economic Development Canada we have Mark Schaan, Director General, Marketplace Framework Policy Branch; Darryl Patterson, Director, Corporate, Insolvency and Competition Directorate, Marketplace Framework Policy Branch; and Paul Morrison, Manager, Policy Development (Insolvency), Marketplace Framework Policy Branch.

Finance Canada, we may start with your comments.

Kathy Wyre, Acting Director, Pensions Policy, Department of Finance Canada: Thank you, Mr. Chair. I believe Mark Schaan will start for us.

The Chair: Thank you very much. I see a pattern here.

[*Translation*]

Mr. Schaan: Thank you, Mr. Chair. To respond to concerns related to the security of workplace pension plans in the context of certain business bankruptcies, the government committed, in Budget 2018, to adopting a whole-of-government, evidence-based approach to improve Canadians' retirement security. Consultations conducted in late 2018 with workers, pensioners, businesses and the public led to more than 4,400 online comments, in addition to official written observations of groups representing stakeholders on that important issue. Following that work, the government proposed legislative amendments to federal legislation related to insolvency, corporate governance and pensions. Those amendments will strengthen retirement security, while continuing to support Canadian marketplace framework laws as solid platforms for economic growth, innovation and job creation for Canadians.

[*English*]

This pan-governmental initiative seeks to show federal leadership and provide appropriate incentives within the bankruptcy and insolvency system, as well as the corporate governance and pension regulation systems in a number of ways.

First, Division 5 of Part 4 amendments the Bankruptcy and Insolvency Act to clarify that the duty of good faith applies to all parties in proceedings, giving courts another tool to ensure that parties act honestly, reasonably and candidly. Second, it provides courts with further powers to address executive payments made before an insolvency, where appropriate, deterring executives from taking actions contrary to the employees and pensioners. Third, it exempts registered disability savings plans from seizure by creditors in bankruptcy proceedings, providing assurance that the funds in these accounts are safe.

Division 5 of Part 4 also amends the Companies' Creditors Arrangement Act to, first, limit the scope of initial court orders and interim financing, lessening the chances of extraordinary relief, such as the suspension of pension contributions being granted at the outset and giving courts more time to hear all parties' views before making more consequential orders. Second, requiring creditors to disclose their real economic interests in proceedings, if required by courts, helping to preserve fairness in insolvency negotiations by rectifying informational imbalances amongst the parties. Third, in line with the Bankruptcy and Insolvency Act change proposed, clarifying that the duty of good faith applies to all parties.

Division 5 of Part 4 also amends the Canada Business Corporations Act, notably to require publicly traded corporations to report on policies that pertain to workers and pensioners' interests, and the recovery of certain incentive-based compensation, providing more market oversight and encouraging conversation about factors impacting corporate strategy and decision-making processes. Second, clarifying that corporate directors may consider employee and pensioner interests, among others, in their decision-making, encouraging directors to take a more comprehensive approach to assessing the long-term interests of the company. And finally, requiring publicly traded corporations to hold non-binding shareholder advisory votes on executive compensation, facilitating conversations about more balanced

executive compensation schemes in certain cases.

Division 5 of Part 4 also amends the Pension Benefits Standards Act, 1985 for which I will turn to my colleagues from Finance.

Ms. Wyre: Thank you. As Mr. Schaan said, Division 5 of Part 4 amendments the Pension Benefits Standards Act, 1985 in two ways. First, it clarifies that a plan member's entitlement to their pension benefits cannot be made conditional on the continued operation of the plan. In other words, it clarifies that members are entitled to the same pension benefits on plan termination as when the plan is ongoing.

Second, it also amends the PBSA to permit defined benefit pension plan administrators that purchase annuities from a regulated life insurance company to transfer their obligation under the plan to provide retirees and other beneficiaries with a pension to the regulated life insurance company, subject to certain conditions. This is intended to help improve defined benefit plan sustainability by allowing them to de-risk and also increase the benefit security of retirees for whom they were purchased, as those retirees' pensions are now provided by a life insurance company and the retirees are no longer subject to the risk of employer insolvency.

The Chair: Are you done, panel?

Mr. Schaan: Yes.

[*Translation*]

Senator Verner: Thank you very much for joining us, ladies and gentlemen. I am a senator from Quebec, so I have obviously read that the Syndicat des Métallos du Québec didn't like that the government did not consider the possibility of declaring registered pension plans as preferred creditors during bankruptcy procedures. I think you are well aware of their claims. I would add that our former colleague Senator Art Eggleton, a senator from Ontario, introduced Bill S-253 in the Senate and in the House of Commons. A Bloc member also introduced a similar bill.

I understand that you are here to explain to us the implications of the bill, but can you tell us whether the government really considered that possibility very seriously, and whether other stakeholders brought it up during consultations? Ultimately, for what major reasons did the government not choose that solution, when we know that the latest bankruptcy, which got a lot of media coverage, was that of the Sears company?

Mr. Schaan: Thank you for the question. The government committed to assessing the effectiveness of those new measures and remains prepared to assess what could be done in the future to improve retirement security. During those consultations, the government clearly heard some people's wish to see a fundamental change in the way creditors are paid in insolvency cases. Serious concerns were also expressed about such a change. After careful consideration, it was determined that the option was not in line with a whole-of-government, evidence-based solution. When you try to address challenges related to pension plans in case of insolvency, you are already in a situation where there is not enough money for everyone and where other emergency policies are engaged.

The primary objective of the system is to promote the survival of sustainable businesses and provide good jobs. The government has some of the most rigorous requirements in terms of pension plan solvency and regulations in Canada, and the plans are 100 per cent funded or must have a plan in place to reach that level. In that case, it is really important to indicate whether, in case of insolvency, it may be easier to change priorities and give all pensioners all the available money. At the same time, it is really important to recognize the goals and agreements of that insolvency system and to ensure that those businesses can be restructured and renewed.

[*English*]

In many cases, we have been able to successfully move through the CCAA process to get to a restructured entity. In part, we've been able to do that because we know that all parties were similarly motivated to be

able to ensure that there was a going concern at the end of it. That means you need to ensure there's an opportunity for creditors to be able to see upside.

Part of that means that if there was a super priority for pensions, in many cases we know that, first, there would not be sufficient money to be able to actually pay out the obligations of pensioners. Many of those unfunded pension liabilities are actually too great to the assets on hand. Second, we know that, absent motivation to be able to pursue the opportunity to be able to see some return, we know restructuring would not be possible.

I know that's not always what some groups want to hear. We have watched the case of Stelco with very strong interest. We know that Stelco right now has an active plant, an active enterprise and an active pension, in part because it was able to draw on the CCAA and get to a buyer who was willing to get to that position. Those jobs and pensions are the best possible outcome we can hope for when a company faces financial difficulty.

Senator Wetston: I just want to ask a question, Mr. Schaan, about say-on-pay. It's a non-binding say-on-pay vote, I take it?

Mr. Schaan: Correct.

Senator Wetston: It is similar to what some other jurisdictions have put in place, as I understand it. You may agree that many publicly listed corporations, particularly on the TSX, are using say-on-pay, non-binding votes now?

Mr. Schaan: Correct.

Senator Wetston: Do you have an approximation of the number?

Darryl Patterson, Director, Corporate, Insolvency and Competition Directorate, Marketplace Framework Policy Branch, Innovation, Science and Economic Development Canada: Yes. Approximately 60 per cent of the S&P/TSX firms and 87 per cent of TSX 60, I believe.

Senator Wetston: So pretty high numbers.

Senator Stewart Olsen: Could I ask you to explain what "say-on-pay" is?

Senator Wetston: Thank goodness I'm not the witness here. It's a very good question.

Mr. Schaan: Essentially, say-on-pay, which we call non-binding advisory votes on executive compensation schemes, require that corporations annually provide a general approach to executive compensation before their shareholders and vote on that generalized approach. That would normally include their approach to salary, benefits, bonuses, share options and other things in a generalized manner. Shareholders would be provided the opportunity to be able to, in a non-binding way, provide advice to the corporation as to whether they agree with that approach.

Senator Stewart Olsen: Thank you. I'm sorry, Senator Wetston, for interrupting you.

Senator Wetston: Don't apologize. I jumped ahead and should have discussed it in terms of executive compensation. It's probably worth mentioning that this is a Securities Act requirement, as well, and the corporate governance rules require executive compensation disclosure of those public companies. So there's kind of a close relationship in corporate law and securities law in this situation.

I just wanted to follow up: Do you have any sense of the number of say-on-pay, non-binding votes that actually resulted in changes to executive compensation? I can think of two or three off the top of my head.

Mr. Schaan: It would be anecdotal, and I wouldn't want to give names of companies because I might have them wrong in my head. I would say that there has definitely been a signal sent through, particularly institutional shareholders who have potentially voted against a general compensation approach, and then, in subsequent years, have voted for. Normally that's because there's been some sort of change.

Senator Wetston: My only other question is about clawbacks. Are we doing anything about clawbacks?

Mr. Schaan: The requirement in the proposed amendments indicates that a corporation, as part of this disclosure related to policies for workers and pensioners, that one of the other things they would be required to disclose to their shareholders is if an executive compensation clawback mechanism exists or not and, if so, what it is. That will essentially provide transparency.

Senator Wetston: Maybe you might explain what that is.

Mr. Schaan: Absolutely. An executive compensation clawback mechanism essentially indicates that where there is a portion of executive compensation that is tied to particular performance results, the directors have set in place a mechanism by which they can actually recall portions of that executive compensation should those performance results not be reached.

Institutional shareholders are very strong fans of executive compensation clawback mechanisms because it holds boards to account. In our particular case, with a retirement security lens on, we were really interested in greater transparency for other interested parties to be able to see the potential discrepancy between gains in executive compensation while there is a growing unfunded pension liability.

Senator Wetston: That's a very positive step.

Senator Marshall: I'm trying to reconcile what Ms. Wyre said. I think I misunderstood you. When you think about Sears, for example, I know some pensioners who work with Sears had their pensions reduced by 30 per cent. I got the impression when you spoke that this would no longer be possible; that they would be entitled to their full pension, regardless. But then Mr. Schaan said that it depends. It might not be fully funded.

Ms. Wyre: Thank you very much for the question. What we're doing is clarifying your entitlement to your benefit. As I said, it's a clarifying amendment. The intent of the legislation has always been there, but was just been suggested to us that it was unclear. But you were always entitled to your pension benefit, regardless of whether the plan is ongoing or terminated.

Senator Marshall: Or whether it's fully funded?

Ms. Wyre: That's what I was about to say. How much money is available to pay those benefits in the event of a planned termination is a separate thing. This is just to say that you were always entitled to your benefits. It has been suggested that perhaps plans could offer to have benefits for which you didn't have the same entitlement if the plan terminated.

The example we used in our consultation paper was a plan that would provide indexation on an ongoing basis, but in the event of planned termination the indexation would be conditional on the event of assets remaining in the plan. Our position is that, no, your entitlement is always the same to those benefits, and we were clarifying that in the legislation.

Senator Marshall: You are distinguishing between your entitlement and what you end up getting. Isn't that so?

Ms. Wyre: What you eventually end up getting depends on what is available in the assets and through the bankruptcy proceedings, but your entitlement should not be different because the plan is terminated.

Senator Marshall: My interpretation is that these changed are aimed at making sure that a company, seeing the writing on the wall that they will not be a going concern, and they start looking after senior management and disregarding people who are lower down the line, like the people ready to go on pension. That's my understanding.

Mr. Schaan: Certainly the changes reflected in the Bankruptcy and Insolvency Act changes and the CCAA changes, particularly the change related to the look-back period for executive compensation.

So when a company enters into financial distress, and particularly when they are in liquidation, the

monitor appointed and is overseen by the courts has the capacity to go back and review transactions in the lead-up to the insolvency to ensure that a corporation was not unduly avoiding what was already an insolvent company to be able to avoid the regulated process of insolvency where people get paid in a particular order. We have extended this to executive compensation and significant raises and compensation. The act already covered shareholder buy-backs and dividends, and we have extended that to try and align incentives so that you can't be making significant executive compensation boosts in advance of what you know to be an insolvency.

It is worth noting that unfunded pension liabilities are an unsecured creditor, so the entitlement notwithstanding any money that is not left. Any money there is held sacrosanct. You can never touch it in the entire time of the company's ongoing role as an entity. The minute a dollar arrives into a pension account it is there until the company goes bust, other than to pay pensioners. The problem is when the company does not have enough to be able to cover in the event they go under. Our rules at the federal level are extremely stringent in this regard. Without speaking for Ms. Wyre, the finance rules are that companies are required to hold 100 per cent of the requirements on a windup basis, meaning they need to prepare for the possibility of insolvency.

In a number of provinces that's not the case. In the province of Quebec, for instance, pensions are only held to a going concern requirement, so they only need enough money to meet their current obligations. In the province of Ontario, that is only 80 per cent.

Senator Marshall: If I were a Sears pensioner, do you have any idea whether that person would be satisfied with those amendments, or is it a movement in the right direction and still has a way to go?

Mr. Schaan: We think this is an important show of federal leadership with the levers we have. I won't raise particular examples, but for some of the companies mentioned those are pensions regulated outside of federal regulation. They are regulated by different provinces. We think we have set the incentive structures in place with the levers we have, be that federally regulated corporations, the insolvency system or our own pension regulation system.

[*Translation*]

Senator Dagenais: My question is for Mr. Schaan. I would like you to give us more information on the impact of changes to better protect people whose pension is affected and threatened. Will those be real changes, or is this an expression of a will to change? That makes a big difference.

Mr. Schaan: Yes, thank you for the question. I think that changes must be made by motivating businesses to further consider the roles, the impact and the consequences of those decisions on pensioners and workers.

[*English*]

When we look at certain changes, like the necessity to consult shareholders on the needs of their workers and pensioners, when we think about the extension of the look-back period to things like executive compensation, when we look at the changes related to good faith in the restructuring process, I think those are real changes for people who are worried about how an insolvency will shake out. We have lifted a greater amount of transparency and give them a greater say in standing.

Ultimately, the hardest part of regulating the insolvency system is that, by definition, there is not enough money to go around. So what we have to do in assisting the minister in his stewardship of this system is to ensure that in such a terrible situation to ask: Are the rules as transparent as possible? Is the process as clear as possible? And are there opportunities to ensure that those who are most affected, or potentially had the least capacity to affect the outcome, have the capacity to be able to have their concerns understood and heard?

We do that in a number of ways, both through the existing system, through the existing super priorities that we already have — which are few but are there for that exact protection — and the work that we are

doing both in this bill and previously about what you do while the entity is not insolvent to try to set out the rules so that when they become insolvent you are in a less bad situation than otherwise.

[*Translation*]

I think those changes are important for enabling the Government of Canada to use the available tools. I recognize that there are other players in this system who are necessary to making other changes. However, for the Government of Canada, that set of changes is a real and important step that will help improve the situation of pensioners and workers.

Senator Dagenais: This is a very complex situation, Mr. Schaan. You know that I chaired a pension committee for a fairly long time. There are many players: The employer, shareholders, managers, planners and, finally, employees, who are always last in line. I think it is important to have pension committees to ensure the enforcement of the right legislation. There are also provincial laws. Thank you for your explanations. In closing, I wish average people who have to explain this the best of luck. Thank you very much.

[*English*]

Senator Duncan: Thank you very much. I have a specific question about the drafting of the legislation and words used. If you would prefer, you could provide the answer in writing if that is preferable in the interests of time.

It concerns the judgment against directors and compensation. For those who printed out and read the legislation, it is pages 94 and 95. My query is about this clause compensation for directors " . . . was made outside the ordinary course of business. . . ." "Ordinary course of business" can mean one thing in Vancouver, another thing in Quebec and another in New Brunswick. I'm concerned that the use of that phrase twice in this particular section is — well, it will finally be determined by the courts, I'm sure. Is there a background to the choice of that phrase and are there other options that might be considered at amendment?

Mr. Schaan: The choice was intentional by drafters. Essentially, what we wanted to do and what the law does is ensure that on the part of compensation, given the very diverse mechanisms by which compensation can potentially flow that the courts and the monitor had the capacity to be able to work around any innovative or novel schemes that may potentially arise that are not yet known. We wanted to say that if you're going to make an executive compensation decision that would have rendered the company insolvent or that you should have known was at a time at which the company was actually insolvent, that you should be held liable for said decision because it was against your fiduciary obligations.

That liability and the choice of words here, "outside the normal course of business," was essentially, if I'm correct, a mechanism to ensure that those other words that are far more precise and get at particular things, like "undervalue" or "at a time when the corporation was insolvent" or "rendered the corporation insolvent," that there was flexibility for the monitors and courts to look at those transactions and ensure they were not inappropriate.

Paul Morrison, Manager, Policy Development (Insolvency), Marketplace Framework Policy Branch, Innovation, Science and Economic Development Canada: Mr. Schaan is correct. As the sections imposed directors' liability, there was not a desire to penalize directors for payments that were made according to normal contracts of compensation like salaries, earned compensation or that type of thing. It was designed to attract compensation that was of an extraordinary nature made in the run-up to insolvency.

Senator Duncan: My concern is if it is an ordinary practice for a senior executive is to be awarded a week's holiday in the Bahamas for him and his family, that's the ordinary course of business if they establish that over time. The argument from the executive toward insolvency may be, "Look, I've had it for 10 years. It's ordinary course of business for me to receive that."

Mr. Schaan: It's worth remembering the safeguards around this provision. The liability would accrue, a potential tort liability, insofar as the courts and monitors were to deem them inappropriate. The monitor and courts have shown extreme prudence in existing transactions, to the umbrage of some other stakeholders on the issues. They believe there have been transactions that should have been overturned because there is quite a bit of due deference given to fair business judgment.

What we have essentially done with these modifications is given the courts and the monitor that capacity, recognizing, of course, that each individual transaction will need to be reviewed against that standard.

Senator Duncan: Thank you.

The Chair: Thank you very much for your participation. It was helpful.

Honourable senators, our final panel will concern Division 26 of Part 4 with respect to the enactment of the Federal Prompt Payment for Construction Work Act.

I'm pleased to welcome Christopher Meszaros, Senior Counsel from the Department of Justice Canada.

Christopher Meszaros, Senior Counsel, Department of Justice Canada: Division 26 is the Federal Prompt Payment for Construction Work Act , and it has a bit of history that I would like to touch on briefly. It has been an issue within the construction industry for many years. At the fiftieth annual joint meeting of the Canadian Construction Association and the federal government that occurred in April of 2016, the issue of timeliness of payments for federal construction contracts was put forward again.

The CCA indicated that, out of the $285 billion of all construction contracts nationally, there was $46 billion in delayed payment. This means 16 per cent of payments were being delayed for quite a period of time — up to two months in some instances.

Payments to contractors were not flowing effectively down through the contracting chain, and many sectors in the industry were suffering because of it. The federal government was asked to take a leadership role and engage in dialogue to identify, assess and implement possible measures to address timeliness of payment.

PSPC commissioned independent experts who performed a similar exercise for the Ontario government known as the Reynolds and Vogel committee. They led an engagement process seeking input from the national construction industry to identify elements required to develop a robust, prompt payment regime. What was key about that was they went out for a national engagement process and invited stakeholders from across Canada to participate, conducted 55 engagement sessions and met with over 500 people. They submitted a detailed recommendations report to PSPC in June of 2018.

In the budget announcement of 2019, the Government of Canada committed to introducing legislation to implement prompt payment to contractors and subcontractors on federal projects on federal lands as well as the adjudication of payment issues. The new legislation was informed by the recommendations report, and it will help ensure payments flow down the construction chain promptly and contribute to the government's objective of achieving best value on its construction projects.

Typically, legislation dealing with contractual relations would fall within provincial jurisdiction in relation to property and civil rights. Federal legislation, in this case, will apply exclusively to federal projects on federal lands.

Federal construction really only compromises about 1 per cent of the work in Canada, but this law is envisioned to be a model for other jurisdictions. Construction industry support is expected.

The industry employs 1.5 million Canadians and represents 7.5 per cent of Canada's workforce, but the Canadian Construction Association, National Trade Contractors Coalition of Canada, and the General Contractors Alliance of Canada have all supported the bill to date.

Ontario Bill 142, the provincial bill, includes very similar prompt payment terms and adjudication measures and was unanimously supported and received Royal Assent in December 2017. Quebec also has a pilot

prompt payment project in place, and other jurisdictions are developing legislation. Additional industry engagement will occur in the future, during the development of further regulations in support of this bill.

There are no new funds requested for this initiative. That is good news. But if any funding is required, Public Services and Procurement Canada will be able to use its existing reference levels.

One of the key components of the bill is that the contractors submit to Her Majesty or a service provider, a proper invoice monthly, or as specified by the contract. Payment is to be made in 28 days of receipt of that proper invoice unless the notice of nonpayment is provided within 21 days. Payment by contractor to subcontractor is to be made within 35 days of delivery of that proper invoice, again unless notice of nonpayment is delivered within 28 days.

Holdbacks are permitted. For any delay in payment, interest will become payable. The key to the legislation is that parties may bring any dispute covered by this act to an adjudicator.

This act is not intended to apply in a province that has similar legislation in place. It allows for an opt-out. Regulations will be further promulgated to set out the powers of the adjudication authority and those of the individual adjudicators. The act won't come into force right away. It has a one-year period when it won't apply to existing contracts, but thereafter it will go on to apply to existing contracts.

The Chair: Thank you very much. I think it was this committee, at some point in time, that looked at this issue. That's very interesting. I'm glad to hear this is moving forward.

You indicated Ontario's Bill 142. Are the provisions of the federal act identical to those?

Mr. Meszaros: No, they are not. There are instances in the federal regime that are different from the provincial, but the overall intent and scheme and much of the intent behind the act is similar, but the clauses are somewhat different, reflecting certain changed circumstances.

Right now we are going through a process with Ontario to see where the differences lie. Again, it is mostly in approach, in some respects, because the intent is virtually identical. But we found certain instances where what they had proposed, when we worked through the scenarios, wouldn't work as well for us so we had to change some of our language.

The Chair: What are the consequences if someone doesn't follow the terms of the act? I'm a contractor. I don't pay my subs. What is the consequence other than arbitration?

Mr. Meszaros: It's adjudication. What is nice about adjudication is it's a quick and somewhat dirty remedy system right now.

You will be able to get a decision from an adjudicator in less than 50 days. What happens is you have to select an adjudicator. That's done in conjunction with the other party. If you can't do it in conjunction, you would go to an adjudication authority to nominate an authority for you.

At that point, the adjudicator is sent all the information required and has a certain period to render his decision, which can be extended if he needs more time. The decision should be made within 30 days, but I'm not sure on the exact time.

The Chair: Are there some enforceability provisions?

Mr. Meszaros: If the order made has not complied with, it can be registered in a court of law and treated as a court order and enforced in that way.

The Chair: Thank you for that. I'm sure that we heard a suggestion — I won't go any further than that — that the Government of Canada was a very slow payer. I presume this legislation applies to the Government of Canada as a contractor.

Mr. Meszaros: It does. As Her Majesty, basically. It's a 28-day requirement for us to pay. Previous to that, we have normally been paying within 30 days.

Senator Stewart Olsen: Thank you for your presentation. I must admit I'm not sure about this legislation because it's presented by the government, and the government is the one that pays the bills. I think we have to be a bit careful on this.

I certainly support it, but the differences in this legislation as compared to the provincial legislation, is the provincial legislation essentially the same? Does it just apply to contracts for the provincial government or is it more far-reaching?

Mr. Meszaros: There are not many differences. Some of them deal with timing issues, clarifications on when the proper invoice would be submitted, things like that. The timing with respect to the Bill 142 in Ontario and our bill is the same: It's a 28-day period, and then a seven-day follow-on.

Senator Stewart Olsen: Does it deal just with provincial contracts?

Mr. Meszaros: The provincial legislation deals with all contracting within the province in that regard, and our legislation deals with our contracting, which would not necessarily be covered by provincial laws.

Pursuant to this bill, we would have this obligation on us across the country. Whether it's in P.E.I. or anywhere else in the country, we need to comply with this legislation, as will contractors and subcontractors working on our projects within those provinces, even if they don't have provincial legislation that applies at the time.

Senator Stewart Olsen: Is it your hope that all the provinces will follow the leader and enact this type of legislation?

Mr. Meszaros: That would be our hope, yes.

Senator Wallin: We had long and extensive hearings on this. There are notes that say that one of the reasons that you are not passing the Senate bill, as opposed to tabling new legislation, is that there was a lack of consultation carried out during the bill's development. So what have you done subsequently?

Mr. Meszaros: We had a great deal of consultation. We hired the firm that did the consultation for Ontario, and they went out nationally and met with 500 people, had 55 engagement sessions all across the country and prepared a voluminous report on what the industry was expecting from this legislation.

Senator Wallin: I think we heard from at least 500 people. I may be exaggerating slightly.

I know that you've now got time lines on this, but there are things that we heard at the time specifically. I see different time lines for different situations, but 49 days, after seven days, et cetera. What we heard in testimony is that for small subcontractors that's not good enough. I don't know what you heard in your consultation, but if you're getting to two or three working months, that's a long time if those 49 days are considered working days.

Mr. Meszaros: There was not much else we could do, because we were trying to keep the timelines as tight as we could, and seven days from contractor to subcontractor or subcontractor to subcontractor, we couldn't see much in the way of acceleration there.

Higher up, from owner — in our case Her Majesty — to contractor, we were looking at the fact that the work has to be looked at, certified and accepted. It didn't seem likely or possible on large projects that we normally do to accelerate that even further. Even if we could, it might have been an extra seven days.

What happens is it's down the contracting chain that time builds up, but if you are a third-tier subcontractor, you are only looking at maybe a little bit over a month or a month and half out, which is better than in the past.

Senator Wallin: It's an improvement, for sure.

Mr. Meszaros: That's what we are aiming for.

Senator Wallin: This, again, is limited now to federal construction on federal property, such as the

Parliament Hill buildings?

Mr. Meszaros: That's correct.

Senator Wallin: If you have passed on money to provinces or municipalities for other related projects such as the roads that lead up to Parliament Hill, that would be deemed a municipal project, but that doesn't apply?

Mr. Meszaros: No. We didn't want to overreach.

[*Translation*]

Senator Dagenais: Thank you, Mr. Meszaros. I think any mechanism for payors in default is a good idea, but is there a public list of defaulters? Such a list is much more effective than an arbitration process that will take months.

[*English*]

Mr. Meszaros: Unfortunately, senator, there is not a list of bad payers, although we do publish when we pay. There is a website for when the Crown has paid its contractors. That in itself at least shows that the money should be flowing, and the parties further down can see where the holdup is and will know that that's maybe a contractor they don't want to bid to next time or a subcontractor they don't want to deal with.

Again, with the adjudication process, it's not perfect; it takes time. We are hoping it may start to weed out some of those parties or at least identify them so that when bidding is going on, hopefully this may be somewhat self-regulating.

The Chair: Mr. Meszaros, thank you very much. That was an interesting follow-up to the work we did a number of years ago. I found it very interesting. Thank you for your very informed presentation.

Senators, we will convene again tomorrow morning at 10:15 to discuss our report on open banking.

(The committee adjourned.)

2019 BCSC 1234
British Columbia Supreme Court

Miniso International Hong Kong Limited v. Migu Investments Inc.

2019 CarswellBC 2208, 2019 BCSC 1234, 308 A.C.W.S. (3d) 465, 71 C.B.R. (6th) 250

MINISO INTERNATIONAL HONG KONG LIMITED, MINISO INTERNATIONAL (GUANGZHOU) CO. LIMITED, MINISO LIFESTYLE CANADA INC., MIHK MANAGEMENT INC., MINISO TRADING CANADA INC., MINISO CORPORATION and GUANGDONG SAlMAN INVESTMENT CO. LIMITED (Petitioners) and MIGU INVESTMENTS INC., MINISO CANADA INVESTMENTS INC., MINISO (CANADA) STORE INC., MINISO (CANADA) STORE ONE INC., MINISO (CANADA) STORE TWO INC., MINISO (CANADA) STORE THREE INC., MINISO (CANADA) STORE FOUR INC., MINISO (CANADA) STORE FIVE INC., MINISO (CANADA) STORE SIX INC., MINISO (CANADA) STORE SEVEN INC., MINISO (CANADA) STORE EIGHT INC., MINISO (CANADA) STORE NINE INC., MINISO (CANADA) STORE TEN INC., MINISO (CANADA) STORE ELEVEN INC., MINISO (CANADA) STORE TWELVE INC., MINISO (CANADA) STORE THIRTEEN INC., MINISO (CANADA) STORE FOURTEEN INC., MINISO (CANADA) STORE FIFTEEN INC., MINISO (CANADA) STORE SIXTEEN INC., MINISO (CANADA) STORE SEVENTEEN INC., MINISO (CANADA) STORE EIGHTEEN INC., MINISO (CANADA) STORE NINETEEN INC., MINISO (CANADA) STORE TWENTY INC., MINISO (CANADA) STORE TWENTY-ONE INC. and MINISO (CANADA) STORE TWENTY-TWO INC. (Respondents)

Fitzpatrick J.

Heard: July 12, 2019
Judgment: July 12, 2019
Written reasons: July 29, 2019
Docket: Vancouver S197744

Counsel: K.M. Jackson, G.P. Nesbitt, for Petitioners
V.L. Tickle, D.R. Shouldice, for Respondents

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Petitioners, secured creditors, were owners of "M" Japanese lifestyle product brand — Respondent debtor companies were Canadian owners and operators who has licensed to use of M brand in Canada, and they also purchased products from creditors for resale in Canada — Creditors advanced US$2.4 million demand loan to debtors, and debtors received substantial amount of M products valued at approximately $17.5 million which were not paid for — Creditors demanded payment of amounts owing under demand loan, earlier account receivable and amounts owing for further supply of M products — Total indebtedness owing by debtors to creditors was approximately $35.5 million, creditors terminated debtors' right to sell and market M brand in Canada

and it would not deliver further products — Creditors brought proceedings pursuant to Companies' Creditors Arrangement Act (CCAA) — Petition granted — Debtor companies were each "company" existing under laws of Canada or province, claims against them exceeded $5 million, and debtors were unable to meet their liabilities as they came due and were insolvent and "debtor company" within meaning of CCAA — CCAA expressly granted standing to creditors to commence proceedings in respect of debtor company — Debtors could not proceed with their business operations without ongoing support of creditors — Stakeholders required relief sought in initial order on urgent basis in order to allow debtors to continue operating their business, and initial order was best option toward preserving debtors' enterprise value for benefit of stakeholders — It was appropriate to grant stay that temporarily enjoyed debtors' creditors from proceeding with claims against them — Proposed monitor was appropriate and was appointed — Factors set out in s. 11.2(4) of CCAA supported approval of $2 million interim financing and granting of charge to secure amounts advanced — Intention was to develop and prepare restructuring transaction, and it was clear that financing was required to continue operations which would allow debtors to maintain value of enterprise while they pursued restructuring — Interim financing would be used only by debtors in accordance with direct supervision of monitor — Restructuring charges including maximum $1 million administration charge and maximum $1 million directors' and officers' charge were necessary, appropriate, fair and reasonable — Restructuring charges were ranked in priority with administration charge first, interim financing charge second, and directors' and officers' charge last.

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s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.51(3) [en. 2005, c. 47, s. 128] — referred to

s. 11.51(4) [en. 2005, c. 47, s. 128] — referred to

s. 11.52 [en. 2005, c. 47, s. 128] — considered

PETITION by secured creditors seeking relief under *Companies' Creditors Arrangement Act*.

***Fitzpatrick J.*:**

INTRODUCTION

1 The petitioners bring these proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Unlike the usual circumstance where the debtor companies commence the proceedings, the petitioners are the secured creditors of the respondent debtor companies, resulting in a creditor-driven *CCAA* proceeding.

2 The petitioners, collectively described as the "Miniso Group", are the owners of the "Miniso" Japanese lifestyle product brand. The Miniso Group manufactures products and operates a number of Miniso stores in Asia where those products are sold. The Miniso Group licenses the "Miniso" name for use in other parts of the world and sells products to those entities.

3 The respondent debtor companies, collectively described as the "Migu Group", are the Canadian owners and operators who have licensed the use of the "Miniso" brand in Canada. The Migu Group also purchases products from the Miniso Group for resale here in Canada.

4 On July 12, 2019, I granted an initial order in this matter (the "Initial Order") with reasons to follow. These are those reasons.

BACKGROUND FACTS

5 The evidence at the hearing consisted of the Affidavit #1 of Qihua Chen, an employee of one entity within the Miniso Group, sworn July 11, 2019.

6 The Miniso Group manufacture lifestyle products under the "Miniso" brand name and distribute those products, under licence, to retail outlets selling "Miniso" branded inventory to the public.

7 The Miniso Group, through a related entity, Miniso Hong Kong Limited, holds all applicable trademarks related to the "Miniso" brand (respectively, the "Miniso Trademarks" and the "Miniso Brand"), including in Canada.

8 The Migu Group are a group of corporations formed primarily to sell "Miniso" branded products in Canada under a licensing agreement with the Miniso Group.

9 The respondent Migu Investments Inc. ("Migu") is the parent company. It owns 100% of the respondents Miniso Canada Investments Inc. ("MC Investments") and Miniso (Canada) Store Inc. ("MC Store").

10 The controlling mind of the Migu Group is Tao Xu, a resident of Toronto, Ontario. Mr. Xu owns the only issued and outstanding common voting share of Migu. The only other shares of Migu are non-voting and non-participating preferred shares.

11 In 2017, the Migu Group acquired the right to use the Miniso Brand in Canada pursuant to various licensing and cooperation agreements with members of the Miniso Group. In addition, on October 7, 2016, various entities entered into a framework cooperation agreement. That agreement provided that the Miniso Group would contribute Miniso Brand products including, without limitation, inventory and standardized Miniso store fixtures (the "Miniso Products") equivalent in value to 20,000,000 RMB and that certain investments would be made to set up a company or companies to operate under the Miniso Brand in Canada.

12 The terms of these agreements, as later amended, included that:

a) The Miniso Group agreed to supply Miniso Products to the Canadian operations for sale in various stores in exchange for payment; and

b) The Canadian operations were to be conducted under the Miniso Group's standard master license agreement, which would allow the Miniso Group to control the use of the Miniso Brand (of which the Miniso Products are a part), throughout the Canadian operations.

13 Starting in 2017, the Migu Group (through MC Investments) began incorporating various subsidiaries. MC Investments owns and controls each of the other named respondent subsidiaries (the "Subsidiaries"). Although the corporate structure is somewhat unclear at this time, these Subsidiaries, either alone or through partnerships or joint ventures, have opened or are in the process of opening retail stores throughout Canada that sell Miniso Brand products (the "Outlet Stores"). Some of the Subsidiaries own more than one Outlet Store and some were incorporated in anticipation of opening additional Outlet Stores.

14 As part of the arrangements, an entity related to the Miniso Group granted to Migu (on behalf of the Migu Group) the right to use and sell Miniso Products and display the Miniso Trademarks in Canada pursuant to a trademark licence agreement dated June 1, 2018 (the "Licence Agreement"). The Licence Agreement contained the following material terms, among others:

a) The Migu Group was only permitted to sell Miniso Products via the Outlet Stores, unless otherwise agreed to by the Miniso Group;

b) The Migu Group was permitted to grant sub-licenses to sub-licensees at its discretion subject to, among others, the condition that each sub-license would require each sub-licensee to be bound by the terms of the Licence Agreement; and

c) The Miniso Group could terminate the Licence Agreement in the event that Migu became insolvent or committed an act of bankruptcy.

15 The Migu Group, through the Subsidiaries, have opened, or are in the process of opening a number of Outlet Stores across Canada (78 estimated at the time of the hearing). The Outlet Stores are located in British Columbia, Alberta, Ontario and Quebec. All Outlet Stores operate out of leased premises. There are two Miniso branded retail locations operating in Nova Scotia in which the Migu Group has an interest, but which are not operated by the Migu Group. The Migu Group also leases several warehouses, distribution centres and offices in various locations. The Migu Group's head office is located in Richmond, B.C.

16 In some cases, the Migu Group contracted with individual investors (the "Investors") to open Outlet Stores partnered with one of the Subsidiaries. It is believed that, in most instances, MC Investments (on behalf of the Migu Group) and an Investor would enter into two agreements to document their arrangement, as follows:

a) An "Investment and Cooperation Agreement", whereby MC Investments and the Investor would agree that, in exchange for the Investor's investment, MC Investments would incorporate a company (one of the Subsidiaries) to operate and manage an Outlet Store selling Miniso branded products. As part of this, MC Investments would grant to the Subsidiary a sublicense permitting it to sell Miniso branded products and to use the Miniso Trademarks under the Miniso Brand; and

b) A "Limited Partnership Agreement", whereby the Investor and MC Investments would act as limited partners and the Subsidiary (through which the Outlet Store would operate) would act as general partner.

17 The parties refer to these arrangements together as the "Joint Venture Store Agreements".

18 In cases where MC Investments entered into a Limited Partnership Agreement with respect to an Outlet Store, the Subsidiary which operated such Outlet Store either acted as general partner to the partnership formed by the Limited Partnership Agreement, or incorporated a general partner in which it held a 51% ownership interest (the "JV Store Affiliates"), with the remaining 49% being owned by the applicable Investors.

19 The Miniso Group understands that each of the Outlet Stores holds a separate bank account through the applicable Subsidiary that operates that Store (collectively, the "Deposit Accounts"), the majority of which are held at TD Canada Trust, which are used for the receipt of cash sales and credit card sales at the Outlet Stores. In addition, the Miniso Group understand that MC Investments holds a master Canadian-dollar account (the "Master Account") and that, historically, the Deposit Accounts were manually swept on a regular basis, at the Migu Group's discretion, into the Master Account.

20 The employees are all employed by MC Investments. The Migu Group currently directly employ approximately 700 people on a part-time or full-time basis. There is no union and collective bargaining agreement in place.

EVENTS LEADING TO INSOLVENCY

21 For some years now, the Miniso Group has shipped and delivered a substantial amount of Miniso Products to the Migu Group. The Miniso Group is the primary supplier of product and inventory to the Migu Group, such that it is estimated that Miniso Product accounts for 80-90% of all merchandise sold in the Outlet Stores. During that time period and until 2018, the Miniso Group shipped and sold approximately $30 million of Miniso Products to the Migu Group, which was then distributed to the Subsidiaries for sale in the Outlet Stores.

22 In December 2017, Miniso International Hong Kong Limited, on behalf of the Miniso Group, advanced a US$2.4 million demand loan to MC Investments (on behalf of the Migu Group) to fund the Migu Group's working capital requirements.

23 In October 2018, the Migu Group also received a substantial amount of Miniso Products valued at approximately $17.5 million. The Miniso Group was not paid for this shipment.

24 In the fall of 2018, the Miniso Group and the Migu Group had a dispute about the demand loan and account receivable. This led to the Miniso Group making demand on the Migu Group for payment. Later still, in mid-December 2018, the Miniso Group filed an application in this Court for a bankruptcy order against the Migu Group.

25 In January 2019, the dispute was resolved when the parties entered into a forbearance agreement. The forbearance agreement provided that:

a) The Migu Group acknowledged and agreed that the demand loan and inventory receivable was due and owing to the Miniso Group;

b) By January 21, 2019, or as otherwise agreed, the parties agreed to negotiate an agreement by which the Miniso Group would acquire all of the assets of the Migu Group relating to its Canadian operations; and

c) The Miniso Group agreed to forbear for a period of time from taking steps to collect the demand loan and the account receivable. In addition, in the meantime, the Miniso Group agreed to continue to supply Miniso Products to the Migu Group, with the purchase price to be added to the outstanding indebtedness. Title to the Miniso Products remained with the Miniso Group until payment in full was made for them.

26 On January 4, 2019, as a condition to the Miniso Group's forbearance:

a) The Migu Group granted to the Miniso Group a general security agreement securing the past and future obligations owing to the Miniso Group;

b) Mr. Xu postponed the security held by him against the Migu Group to the security in favour of the Miniso Group; and

c) The Migu Group entered into a temporary licence agreement for the use of the Miniso Brand during the period of the forbearance.

27 On March 5, 2019, the Migu Group provided a further general security agreement to the Miniso Group as security for its obligations to the Miniso Group. Mr. Xu, MC Store and MC Investments also executed priority agreements in favour of the Miniso Group.

28 On February 23, 2019, various entities entered into an asset purchase agreement by which the Migu Group agreed to sell its Canadian operations Miniso Lifestyle Canada Inc. ("Miniso Lifestyle") or a designated purchaser (the "APA"). The APA provided that:

a) The Migu Group appointed Miniso Lifestyle to operate and manage the Canadian operations until the earlier of the closing of the sale under the APA or termination of the APA;

b) The Miniso Group would continue to supply the Miniso Products to MC Investments; and

c) Grant Thornton LLP would be engaged as auditor to conduct an audit of the Canadian operations of the Migu Group to determine the amount of net capital invested by the Migu Group, including Mr. Xu, for the purpose of determining the purchase price payable under the APA.

29 In addition, on March 5, 2019, the Miniso Group provided financial support to the Migu Group pending a closing or termination of the APA. Miniso Lifestyle advanced $1.5 million to the Migu Group to be used to fund its Canadian operations. In addition, Miniso Lifestyle deposited $1.5 million in escrow pending the closing of the transaction contemplated in the APA or the termination of the APA.

30 After completing its due diligence, the Miniso Group did not waive the conditions in the APA. Accordingly, effective June 30, 2019, the APA expired.

31 On June 25, 2019, the Miniso Group's counsel demanded payment of the amounts owing under the demand loan, the earlier account receivable and the amounts owing for the further supply of Miniso Products after January 2019. On July 3, 2019, the Miniso Group's counsel demanded the return of the deposit that had been placed in escrow and payment of the March 2019 loan.

CURRENT STATUS

32 As of July 3, 2019, the total indebtedness owing from the Migu Group to the Miniso Group was approximately $35.5 million.

33 The Miniso Group is the primary secured creditor of the Migu Group's assets, under two general security agreements (except in Quebec where no security is held). There are other minor secured interests registered by certain equipment financiers and landlords. Mr. Xu still holds security against the assets, which is subordinated to the Miniso Group.

34 The Migu Group is current in respect of its obligations to pay employee wages and related remittances. However, it is possible that some or all employees are owed accrued and unused vacation pay. The Migu Group does not have a pension plan for their employees.

35 It is uncertain if the Migu Group's provincial sales tax remittances are current.

36 As noted, all of the premises from which the Migu Group operates across Canada are leased. The Migu Group currently remits monthly rents of approximately $1.79 million. Some of the July rental payments (for 20 stores) have been paid; however, rent for the remainder of the premises, totalling approximately $1.16 million, has not been paid.

37 The Migu Group owes approximately $2 million in other accrued and unpaid unsecured liabilities, including to suppliers and service providers. It is anticipated that the Migu Group will honour outstanding gift card and credit notes during these *CCAA* proceedings and honour existing warranty and return policies.

38 The Migu Group's consolidated assets, as at May 31, 2019, had a book value of approximately $53.3 million.

39 The Migu Group's value is almost entirely derived from their ability to sell and market Miniso Products under the Miniso Brand in Canada through the various agreements with the Miniso Group and importantly, their licence agreements with the Miniso Group. As of this date, the Miniso Group has terminated the Migu Group's right to sell and market the Miniso Brand in Canada and the Miniso Group will not deliver further product, save on terms acceptable to the Miniso Group. As such, the Migu Group is no longer able to market and sell the Miniso Brand. In addition, the Miniso Product in the possession of the Migu Group is the property of the Miniso Group until it is paid for.

40 The result is obvious - the Migu Group cannot operate their business and generate revenue without the cooperation and support of the Miniso Group.

CCAA ISSUES

41 I will briefly discuss the various issues that arose on this application for the Initial Order.

Statutory Requirements

42 The *CCAA* applies in respect of a "debtor company" or "affiliated debtor companies" where the total amount of claims against the debtor or its affiliates exceeds $5 million: *CCAA*, s. 3(1). "Debtor company" is defined in s. 2 of the *CCAA* to include any company that is bankrupt or insolvent.

43 I am satisfied that each of the companies within the Migu Group is a "company" existing under the laws of Canada or one of the provinces and that the claims against them exceed $5 million.

44 Further, I am satisfied that the Migu Group, either individually or collectively, are unable to meet their liabilities as they come due and are therefore insolvent, and thus each is a "debtor company" within the meaning of the *CCAA*: see *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2; *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]) at paras. 21-22; leave to appeal ref'd, [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. ref'd [2004] S.C.C.A. No. 336 (S.C.C.).

45 The *CCAA* expressly grants standing to creditors, such as the Miniso Group, to commence proceedings in respect of a debtor company: *CCAA*, ss. 4-5; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Ont. S.C.J. [Commercial List]) at para. 34.

Objectives of the CCAA

46 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Court provided a detailed analysis of the purpose and policy behind the *CCAA*. Of particular note were the Court's comments that:

a) the purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets (para. 15); and

b) the *CCAA*'s distinguishing feature is a grant of broad and flexible authority to the supervising court to use its discretion to make the order necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The courts have used its *CCAA* jurisdiction in increasingly creative and flexible ways (para. 19).

47 The commencement of *CCAA* proceedings is a proper exercise of creditors' rights where, ideally, the *CCAA* will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario: *Citibank Canada v. Chase Manhattan Bank of Canada*, [1991] O.J. No. 944 (Ont. Gen. Div.) at para. 49; *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]) at paras. 33 and 40.

48 The imperatives facing both the Miniso Group and the Migu Group here are stark.

49 Without the cooperation of the Miniso Group, including access to immediate interim financing from the Miniso Group, the Migu Group will be unable to meet their liabilities as they become due and it will not be able to continue their operations and preserve their assets. The Migu Group is facing numerous claims from creditors other than the Miniso Group.

50 In addition, the Migu Group's ability to repay the indebtedness owed to the Miniso Group will be severely compromised in the event of a receivership and liquidation.

51 Simply put, the Migu Group cannot proceed with its business operations without the ongoing support of the Miniso Group.

52 There is no doubt that the Miniso Group has dictated the course forward, for the most part. The Miniso Group holds first ranking security over all of the Migu Group's assets. The Miniso Group has determined that a *CCAA* process is the best means to ensure the preservation and sale of the Migu Group's business as a going concern and maintain enterprise value for the benefit of all stakeholders, including the Miniso Group. In addition, as discussed below, the Miniso Group has agreed to provide interim financing during the course of the restructuring in order to allow that process to unfold.

53 I have no doubt that the Migu Group has asserted its wishes and wants within the context of the past and ongoing negotiations between the two Groups. However, the Migu Group now grudgingly accepted its fate and did not oppose the relief sought here.

54 In addition, I was satisfied that the stakeholders require the relief sought in the Initial Order on an urgent basis in order to allow the Migu Group to continue operating their business. The need for cash was immediate and without access to interim financing and the stay of proceedings, the Migu Group was not be able to preserve the value of their business or even ensure the coordinated realization of their assets. As such, the Initial Order was the best option toward preserving the Migu Group's enterprise value for the benefit of their stakeholders.

55 After considering all of the circumstances, I am satisfied that these *CCAA* proceedings can assist in preserving value for the stakeholders, until a longer term solution is found.

The Stay of Proceedings

56 In addressing the granting of a stay of proceeding in an initial order under the *CCAA*, Justice Farley in *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]) stated:

[5] ... a judge has the discretion under the CCAA to make [an] order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. ...

> [6] ... It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain the approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed ...
>
> 7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors ...

57 I was satisfied that it was appropriate to exercise my discretion under s. 11.02(1) of the *CCAA* to grant a stay that temporarily enjoins the Migu Group's creditors from proceeding with claims against the debtor companies. This stay of proceedings will prevent any creditor from gaining any advantage that might otherwise be obtained. It will also facilitate the ongoing operations of the Migu Group's business to preserve value and provide the Group with the necessary breathing room to carry out a restructuring or organized sales process.

58 The Miniso Group sought a stay not only against the Migu Group, but also with respect to other entities that are not parties to this proceeding, namely the JV Store Affiliates. The JV Store Affiliates are the general partner companies or partnerships formed to operate the Outlet Stores.

59 The Court has broad jurisdiction under s. 11.02(1) of the *CCAA* to impose stays of proceedings where it is just and reasonable to do so, including with respect to third party non-applicants.

60 In *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]), the court discussed circumstances that could justify extending the stay to third party non-applicants:

> [64] The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:
>
> a. where it is important to the reorganization process;
>
> b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA (such as partnerships that are not "companies" under the CCAA);
>
> c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and
>
> d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

61 As noted in *Cinram International Inc.*, there is specific authority to grant a stay of proceedings against entities within a limited partnership context, where the business operations of the debtor companies are intertwined within that corporate/partnership structure: *Lehndorff General Partner Ltd.* at paras. 12, 16-21; *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at paras. 33-34.

62 I found that it was just and appropriate to extend the stay in these proceedings to include the JV Store Affiliates in the circumstances. The business operations of the Outlet Stores are intertwined with the JV Store Affiliates. There is also some intertwining of the financial obligations of the Migu Group and that of the JV Store Affiliates.

63 The draft Initial Order sought a stay for 10 days until July 22, 2019. It appears that the length of the stay was set at 10 days in light of the uncertainty with respect to amendments proposed to the *CCAA* by the *Budget Implementation Act*, 2019, No. 1 Part 4 ("Bill C-97") tabled in Parliament in March 2019.

64 With respect to initial applications under the *CCAA*, ss. 136-138 of Division 5 (Enhancing Retirement Security) of Bill C-97 contains an important amendment. Section 137 includes an amendment to s. 11.02(1), as follows:

> **Stays, etc. — initial application**
>
> **11.02 (1)** A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,
>
> [Emphasis added.]

65 Bill C-97 received Royal Assent on June 21, 2019. However, s. 152 of Bill C-97 provides that the amendments to the *CCAA* come into force on a day to be fixed by order of the Governor in Council. As best the parties have discerned, no such order in Council has yet been pronounced.

66 The intent behind the new s. 11.02(1) is clear. It limits the exercise of discretion by the Court in determining the length of any stay such that the maximum amount of any stay will be 10 days, as opposed to the previous 30-day limit.

67 In any regard, I was satisfied that the relief sought here for a 10-day stay was appropriate. At this time, only the Miniso Group has been involved in this process. All parties recognize that many other stakeholders' interests are at play here. Those persons are entitled to notice as soon as possible so that they can appear and be heard in respect of the relief granted in the Initial Order and in terms of any relief that might be granted in this proceeding in the future.

68 I therefore exercised my discretion and concluded that the 10-day stay was appropriate in the circumstances.

The Monitor

69 The Miniso Group proposed that Alvarez & Marsal Canada Inc. ("A&M") act as the monitor. As I will discuss below, the relief sought would vest A&M with powers greater than is usually found in a *CCAA* proceeding, giving the monitor more oversight and power to direct the business operations of the Migu Group over the course of the restructuring.

70 In the usual fashion, A&M filed a Pre-Filing Report as the proposed monitor dated July 12, 2019.

71 A&M indicated that it has no conflicts that would prevent it from acting as a monitor in this proceeding: *CCAA* s. 11.7(2). A&M have consented to act as monitor and to provide supervision and monitoring during the proceedings. In addition, in accordance with the Initial Order, A&M agreed to manage the Migu Group's business during these proceedings, including by engaging Miniso Lifestyle under a management services agreement, until the implementation of a restructuring transaction.

72 I was satisfied that A&M is an appropriate entity to be appointed as monitor in these proceedings (the "Monitor").

Interim Financing

73 The Miniso Group sought an order to approve interim financing for the Migu Group in order to allow the Migu Group to meet its obligations over the stay period granted under the Initial Order. In consultation with the Monitor, the Miniso Group agreed to advance up to $2 million to the Migu Group under an interim credit facility agreement to allow the Migu Group to pay their ongoing business and restructuring expenses.

74 As is typically the case, it was a condition of any advance under the interim financing that the lender be granted a priority Court-ordered charge on all the assets, rights, undertakings and properties of the Migu Group as security for amounts advanced, to rank after the proposed administration charge discussed below.

75 Section 11.2(1) of the *CCAA* vests the Court with jurisdiction to grant an interim debtor-in-possession a financing charge in priority to the claim of any secured creditor of the debtor company, on notice to secured creditors who are likely to be affected

by the security or charge. Section 11.2(4) of the *CCAA* sets out the non-exhaustive factors that the Court may consider before granting such a charge:

> (a) the period during which the company is expected to be subject to proceedings under the CCAA;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report, if any.

76 Bill C-97 is also relevant to this aspect of the relief sought in respect of the interim financing.

77 Section 136 of Bill C-97 provides for a new s. 11.001. This new section introduces, within the context of s. 11 orders generally, a restriction on the Court's discretion to not only order what is "appropriate" under s. 11, but also only what is "reasonably necessary for the continued operations of the debtor company in the ordinary course" during the relevant stay period:

> **Relief reasonably necessary**
>
> **11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.
>
> [Emphasis added.]

78 Specific amendments in respect of interim financing are also found in Bill C-97 and dovetail the above restriction in s. 11.001 as to what is "reasonably necessary". Section 138 of Bill C-97 provides for the addition of a new s. 11.2(5) of the *CCAA*, as follows:

> **Additional factor — initial application**
>
> **(5)** When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.
>
> [Emphasis added.]

79 Accordingly, the intent of Parliament under the new s. 11.2(5) is to curtail the discretion of the Court to grant interim financing in the stay period under an initial order (i.e. up to 10 days) to only what is "reasonably necessary" during that stay period.

80 This provision is not inconsistent with the current approach of Canadian courts when exercising its discretion under s. 11.2 of the *CCAA*. Indeed, the provisions of the new s. 11.2(5) are echoed in Justice Farley's comments in *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]):

> [24] It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances — as opposed, for instance, to a receivership or bankruptcy — and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.
>
> [Emphasis added.]

81 A consideration of the proposal for interim financing here is very much informed by the considerable uncertainty about what financial resources are available to the Migu Group at this time.

82 The Monitor reports that the opening cash position of the Migu Group is approximately $1.4 million as of July 12, 2019. However, certain creditors have recently filed an action against the Migu Group and, on July 9, 2019, obtained a garnishing order for $1,040,772.50 as against MC Investments' Master Account at TD Canada Trust. It is therefore possible that TD Canada Trust has paid that amount or some of that amount into court or, at least, frozen the balance in Master Account. If that has happened, then the balance on hand is no longer available for the Migu Group's needs.

83 The cash flow indicates that payroll of approximately $700,000 was to be due the week after the Initial Order was granted. In addition, rental payments of approximately $800,000 were necessary in the immediate future. The cash flow projections assume ongoing sales, but that amount is also uncertain.

84 The Monitor supported the granting of the interim financing, in light of the needs of the Migu Group required during the restructuring and in light of the uncertainty about current financial resources.

85 I was satisfied that the s. 11.2(4) factors supported the approval of the $2 million interim financing and the granting of a charge to secure the amounts advanced.

86 I accepted the submissions of the Miniso Group, supported by the Monitor, that the intention is to develop and prepare a restructuring transaction, including a restructuring and a sale of some part of the Migu Group's Canadian operations, as soon as practicable. It is obvious that financing is required to continue operations. With this financing, the Migu Group is able to continue to operate the Outlet Stores, with continued employment of their store-level employees and ongoing payment of rents, while they work with the Monitor and the Miniso Group to formulate a plan. The interim financing is therefore necessary to permit the Migu Group to maintain the value of the enterprise while they pursue a restructuring.

87 In addition, I was provided some assurance that the interim financing will be used only by the Migu Group in accordance with the direct supervision of the Monitor. The Monitor's powers include the monitoring, review and direction regarding the Migu Group's receipts and disbursements.

88 I also approached the matter of interim financing in the spirit of the new s. 11.2(5) of the *CCAA*. I was satisfied that, in these unique and uncertain circumstances, the $2 million of interim financing was potentially reasonably necessary to address the needs of the Migu Group until the comeback hearing 10 days later on July 22, 2019.

89 In addition, in order to reflect the Court's clear intention in that respect, the Initial Order was amended to limit the Migu Group's use of the $2 million interim financing by provided that:

> 50. ... until the Comeback Hearing, borrowings are limited to the minimum amount required to cover all expenses reasonably incurred by the Debtors in carrying on the Business in the ordinary course.

90 I also concluded that the interim financing was on commercially reasonable terms: allowing for draws of $250,000; no standby fee; interest rate of 10% per annum; and, no prepayment penalty.

Restructuring Charges

91 The Miniso Group sought an administration charge over the Migu Group's assets, properties, and undertakings up to the maximum amount of $1 million to secure payment of the fees and disbursements of the Monitor, and its and the Migu Group's legal counsel, incurred in connection with services rendered both before and after the commencement of these *CCAA* proceedings. The administration charge sought is to rank in priority to all other encumbrances, including all other court-ordered charges.

92 Section 11.52 of the *CCAA* expressly provides the Court with the power to grant a charge in respect of professional fees and disbursements on notice to affected secured creditors.

93 Administration charges are a usual feature of *CCAA* initial orders. As stated in *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para. 66, unless professional advisor fees are protected by way of a charge, the objectives of the *CCAA* would be frustrated as professionals would be unlikely to risk offering services without any assurance of ultimately being paid. Failing to provide protection for professional fees will "result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings".

94 The basis for an administration charge is well made out here, particularly given the Miniso Group's substantial and first ranking charge over the Migu Group's assets.

95 In *Canwest Publishing Inc.* at para. 54, the court refers to certain factors that could be considered in determining the amount of an administration charge:

> (a) the size and complexity of the business being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

96 I was satisfied that a $1 million limit for the administration charge was appropriate. The amount of the administration charge was determined in consultation with the Monitor. I concluded that this amount was fair and reasonable in light of the number of stakeholders, the size and complexity of the Migu Group's business and the scope and complexity of the proposed restructuring.

97 The Miniso Group was also seeking a directors' and officers' charge (the "D&O Charge") over the Migu Group's assets, properties and undertakings to indemnify the directors and officers in respect of liabilities they may incur as directors and officers during these proceedings, up to a maximum of $1 million.

98 Pursuant to s. 11.51(1) of the *CCAA*, the Court has jurisdiction to grant a charge to secure a directors' and officers' indemnification on a priority basis on notice to the affected secured creditors. The charge must relate to any obligations or liabilities that may be incurred after the commencement of proceedings. The court must be satisfied with the amount of the

charge, that insurance is not otherwise available (s. 11.51(3)) and that the charge will not provide coverage for wilful misconduct or gross negligence (s. 11.51(4)): *Canwest Publishing Inc.* at paras. 56-57.

99 Here, the extent to which the directors and officers of the Migu Group may be exposed is unknown to a large degree. The Miniso Group has been advised that the directors and officers of the Migu Group do not have any directors' and officers' liability insurance in place. In consultation with the Migu Group, the Monitor has recommended that the D&O Charge be limited to $1 million.

100 I concluded that the D&O Charge was necessary and appropriate in the circumstances. The D&O Charge will ensure that the directors and officers of the Migu Group continue in their current capacities in the context of these *CCAA* proceedings. I am advised that the directors and officers of the Migu Group are prepared to continue in their roles during these proceedings.

101 I also accepted the Miniso Group's proposal that the various restructuring charges granted rank in priority, as follows:

a) Firstly, the administration charge (maximum $1 million);

b) Secondly, the interim financing charge (maximum $2 million, plus interest, costs, fees and disbursements); and

c) Thirdly, the D&O Charge (maximum $1 million).

Restructuring

102 At this preliminary stage, the germ of the restructuring plan has been formulated by the Miniso Group and generally provides:

a) There will be a consensual realization process toward ensuring the preservation of the Migu Group's Canadian operations;

b) Miniso Lifestyle will manage the Canadian operations on behalf of the Migu Group during the *CCAA* proceedings in accordance with the management services agreement;

c) The Migu Group will not have any further communications with landlords, creditors or other stakeholders, except as approved by the Miniso Group;

d) The Monitor will consult with the Miniso Group and, with respect to certain premises, the Migu Group, regarding which real property leases are to be terminated. Some leases are personally guaranteed by entities who want to be consulted before any disclaimer. Sales at Outlet Stores would continue during the 30-day disclaimer period and retail employees would be incentivized to continue their employment during that time;

e) A&M will have enhanced powers as Monitor to manage the Canadian operations and negotiate and implement a transaction, in consultation with the Migu Group; and

f) By that anticipated transaction, the Miniso Group would acquire certain assets of the Migu Group comprising some or all of the Canadian operations so as to allow continued operation of certain of the Outlet Stores.

103 The stay under the Initial Order will remain in place until July 22, 2019. By that time, the numerous other stakeholders will have been served and they will have time to enable them to consider the impact of these *CCAA* proceedings and their position, if any, in response to it.

104 At the comeback hearing, the Court and all other stakeholders will have updated information as to the status of the Migu Group. In the meantime, the stay will be in place to allow the Monitor to operate the business and maintain the *status quo* while it works with the Miniso Group and Migu Group to develop a restructuring plan. The best estimate at the time of the hearing was that such a plan may be ready to present to the creditors within a few months.

CONCLUSION

105 At the conclusion of the hearing, I granted the Initial Order, as proposed, with certain amendments that arose from a consideration of certain issues during the course of the hearing.

Petition granted.

Most Negative Treatment: Check subsequent history and related treatments.

2008 CarswellOnt 2652
Ontario Superior Court of Justice [Commercial List]

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 2652, [2008] O.J. No. 1818, 168 A.C.W.S. (3d) 245, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT Involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP.,METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP.,METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 6932819 CANADA INC. AND 4446372 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents)

C. Campbell J.

Heard: March 17, 2008
Judgment: April 8, 2008
Docket: 08-CL-7440

Counsel: B. Zarnett, F. Myers, B. Empey for Applicants
R.S. Harrison for Metcalfe & Mansfield Alternative Investments II Corps.
Scott Bomhof, John Laskin for National Bank of Canada
Peter Howard, William Scott for Asset Providers/Liquidity Providers
Jeff Carhart, Joe Marin, Jay Hoffman for Ad Hoc Committee of ABCP Holders
T. Sutton for Securitus
Jay Swartz, Nastasha MacParland for New Shore Conduits
Aubrey Kaufmann for 4446372 Canada Inc.
Stuart Brotman for 6932819 Canada Inc.
Robin B. Schwill, James Rumball for Coventree Captial Inc., Coventree Administration Corp., Nereus Financial Inc.
Ian D. Collins for Desjardins Group
Harvey Chaiton for CIBC
Kevin McEicheran, Geoff R. Hall for Bank of Montreal, Bank of Nova Scotia, CIBC, Royal Bank of Canada, Toronto Dominion Bank
Marc S. Wasserman for Blackrock Financial
S. Richard Orzy for CIBC Mellon, Computershare, Bank of New York as Indenture Trustee
Dan Macdonald, Andrew Kent for Bank of Nova Scotia
Virginie Gauthier, Mario Forte for Caisse de Dépôt
Junior Sirivar for Navcan

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.ii Stay

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Each debtor was corporation that was trustee of one or more conduits, was legal owner of assets held for each series in conduit of which it was trustee, and was debtor with respect to Asset Backed Commercial Paper ("ABCP") issued by trustee of conduit — Creditors held more than $21 billion of approximately $32 billion of ABCP at issue in proceeding — Each debtor was insolvent — Original trustees that were trust companies were replaced by certain of debtors to facilitate application under Companies' Creditors Arrangement Act ("CCAA") — Creditors brought application for initial order under CCAA — Application granted — Application complied with requirements of CCAA — Replacement of trust entities that did not qualify as "companies" under CCAA by debtors that did was appropriate exercise of legally available rights to satisfy threshold requirements of CCAA — Debtors were "debtor companies" within meaning of CCAA — Joining of claims in one proceeding promoted convenient administration of justice — Relief sought was available under, and was consistent with purpose and policy of, CCAA — Failure of plan would cause far-reaching negative consequences to investors — Classification of creditors set out in plan for voting and distribution purposes, involving single class of creditors, was appropriate — Plan treated all ABCP holders equitably — Fragmentation of classes would render it excessively difficult to obtain approval of plan and so was contrary to purpose of CCAA.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Table of Authorities

Cases considered by *C. Campbell J.*:

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Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — considered

Calpine Canada Energy Ltd., Re (2007), 2007 ABQB 49, 2007 CarswellAlta 156, 28 C.B.R. (5th) 185 (Alta. Q.B.) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

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Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — referred to
Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) — referred to
Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 1991 CarswellOnt 220, 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — considered
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Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2 "company" — referred to

s. 2 "debtor company" — referred to

s. 3 — referred to

s. 3(1) — referred to

s. 4 — referred to

s. 5 — referred to

s. 8 — referred to

s. 11 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 5.01 — referred to

R. 5.02 — referred to

APPLICATION by creditors for initial order under *Companies' Creditors Arrangement Act*.

***C. Campbell J.*:**

1 These are the reasons for this Court having granted on March 17, 2008 an Initial Order under the *Companies Creditors Arrangement Act* ("CCAA") in respect of various corporate trustees in respect of what is known as Asset Backed Commercial Paper ("ABCP.")

2 This highly unusual and hopefully not to be repeated procedure (given its magnitude and implications) represents the culmination of a great deal of work and effort on the part of the Applicants known informally as the Investors' Committee under the leadership of a leading Canadian lawyer and businessman, Purdy Crawford.

3 Assuming approval of the proposed Plan under the CCAA, the process will result in the successful restructuring of the ABCP market in Canada and avoid a liquidity crisis that would result in certain loss to many of the various participants in the ABCP market.

4 It is neither necessary nor appropriate in these Reasons to describe in detail just what is involved in the products and operation of the ABCP market.

5 The Information Circular that is part of the Application and will be sent to each of the affected Noteholders (and is also found on the website of the Monitor, Ernst & Young), contains a complete description of the nature of the products, the various market participants, the problem giving rise to the liquidity crisis and the proposed Plan that, if approved, will allow for recovery by most Noteholders of at least their capital over time in return for releases of other market participant parties.

6 An equally informative but less detailed description of the market for ABCP and its problems can be found in the affidavit of Mr. Crawford in the sites referred to above.

7 The Applicants include Crown corporations, business corporations, pension funds and financial institutions. Together, they hold more than $21 billion of the approximately $32 billion of ABCP at issue in this proceeding. Each Applicant holds ABCP for which at least one of the Respondents is the debtor. Each Applicant has a significant ABCP claim.

8 Each series of ABCP was issued pursuant to a trust indenture or supplemental trust indenture. Each trust indenture appointed an "Indenture Trustee" to serve as trustee for the investors, and gave that trustee certain rights, on behalf of investors, to enforce obligations under ABCP. However, the Indenture Trustee has no economic interest in the underlying debt and, under the circumstances, it is neither practical nor realistic to expect the Indenture Trustees to put forward a restructuring plan.

9 In this proceeding, the Applicants seek to put forward and obtain approval of the restructuring plan they have developed in their own right as holders of ABCP and as the real creditors of the Respondents.

10 Each Respondent is a corporation which is the trustee of one or more Conduits. Each Respondent is the legal owner of the assets held for each series in the Conduit of which it is the trustee, and is the debtor with respect to the ABCP issued by the trustee of that Conduit. The ABCP debt for which each Respondent is liable exceeds $5 million.

11 Each ABCP note provides that recourse under it is limited to the assets of the trust. The trust indentures pursuant to which each series of notes were issued provide that each note is to be repaid from the assets held for that series.

12 Since mid-August, 2007, the trustees of each of the Conduits have, in respect of each series of ABCP, had insufficient liquidity to make payments that were due and payable on their maturing ABCP. Each remains unable to meet its liabilities to the Applicants and to the other holders of each series of ABCP as those obligations become due, from assets held for that series. Accordingly, each of the Respondents is insolvent.

13 Most of the Conduits originally had trustees that were trust companies. The original trustees that were trust companies were replaced by certain of the Respondents, in accordance with applicable law and the terms of the applicable declarations of trust, in order to facilitate the making of this Application. The Respondents that replaced the trust companies assumed legal ownership of the assets of each Conduit for which they serve as trustees and assumed all of the obligations of the original trustees whom they replaced.

14 The Applicants chose court proceedings under the CCAA because the issuer trustees of the Conduits, as currently structured, are insolvent because they cannot satisfy their liabilities as they become due. The CCAA process allows meaningful efficiencies by restructuring all of the affected ABCP simultaneously while also providing stakeholders, including Noteholders, with more certainty that the Plan will be implemented. In addition, the CCAA provides a process to obtain comprehensive releases, which releases bind Noteholders and other parties who are not directly affected by the Plan. The granting of these comprehensive releases is a condition of participation by certain key parties.

15 The CCAA expresses a public policy favouring compromise and consensual restructuring over piecemeal liquidation and the attendant loss of value. It is designed to encourage and facilitate consensual compromises and arrangements among businesspeople; indeed the essence of a CCAA proceeding is the determination of whether a sufficient consensus exists among

them to justify the imposition of a statutory compromise. It is only after this determination is made that the Court will examine whether a plan is otherwise fair and reasonable.

16 On the first day of a CCAA proceeding, the Court should strive to maintain the *status quo* while the plan is developed. The Court will exercise its power under the statute and at common law in order to maintain a level playing field while allowing the debtor the breathing space it needs to develop the required consensus. At this stage, the goal is to seek consensus — to allow the business people and individual investors to make their judgments and to express those judgments by voting. The Court's primary concern on a first day application is to ensure that the business people have a chance to exercise their judgment and vote on the Plan.

17 The Applicants submitted that the Initial Order sought should be granted and the creditors given an opportunity to vote on the Plan, because (a) this application complies with all requirements of the CCAA and is properly brought as a single proceeding; (b) the relief sought is available under the CCAA. It is also consistent with the purpose and policy of the CCAA and essential to the resolution of the ABCP crisis; and (c) the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

18 ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling." Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption," ABCP would readily be saleable without the need for extraordinary funding measures.

19 There are three questions that need to be answered before the Court makes an Order accepting an Initial Plan under the CCAA.

20 The first question is, does the Application comply with the requirements of the CCAA? The second question involves determining that the relief sought in the circumstances is available under the CCAA and is consistent with the purpose and policy of the statute. The third question asks whether the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

21 I am satisfied that all three questions can be answered in the affirmative.

22 The CCAA, despite its relative brevity and lack of specifics, has been accepted by the Courts across Canada as a vehicle to encourage and facilitate consensual compromise and arrangements among various creditor interests in circumstances of insolvent corporations.

23 At the stage of accepting a Plan for filing, the Court seeks to maintain a status quo and provide a "structured environment for the negotiation of compromises between a company and its creditors." The ultimate decision on the acceptance of a Plan will be made by those directly affected and vote in favour of it. [1]

24 Section 3(1) of the CCAA applies in respect of a "debtor company" or "affiliate debtor companies" with claims against them of $5 million.

25 The problem faced by the applicants in this proceeding is that the terms "company" and "debtor company" as defined in s. 2 of the CCAA do not include trust entities.

26 For the purpose of this Application and proposed Plan, those entities that did not qualify as "companies" for the purposes of the CCAA were replaced by Companies (the Respondents) that do meet the definition.

27 I am satisfied in the circumstances that these steps are an appropriate exercise of legally available rights to satisfy the threshold requirements of the CCAA. I am satisfied that the change in trustees was undertaken in good faith to facilitate the making of this application.

28 The use of what have been called "instant" trust deeds has been judicially accepted as legitimate devices that can satisfy the requirement of s. 3 of the CCAA as long as they reflect legitimate transactions that actually occurred and are not shams. [2]

29 I am satisfied that the Respondents are "debtor companies" within the meaning of the CCAA because they are companies that meet the s. 2 definition and they are insolvent. The Conduits (referred to above) are trusts and the Respondents are trustees of those trusts. The trustee is the obligor under the trusts covenant to pay. I am satisfied that the trustee corporations are "insolvent" within the judicially accepted meaning under the CCAA.

30 The decision in *Stelco Inc., Re* [3] sets out three disjunctive tests. A company will be an insolvent "debtor company" under the CCAA if: (a) it is for any reason unable to meet its obligations as they generally become due; or (b) it has ceased paying its current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of its property is not, at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

31 I am satisfied that on the material filed as of August 13, 2007 and the stoppage of payment by trustees of the Conduits (which continues), the Conduits and now the Respondents remain unable to meet their liabilities at the present time.

32 The Conduits and now trustees in my view meet the test accepted by the Court in *Stelco Inc., Re* of being "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring." [4] Indeed, it was that very circumstance that brought about the standstill agreement and the ensuing discussions and negotiations to formulate a Plan.

33 Finally on this point I am satisfied that the insolvency of the Respondents is not affected or negated by contractual provisions in the applicable notes and trust indentures that limit Noteholders' recourse to the trust assets held in the Conduits. This statement should not be taken as a determination of the rights or remedies of any creditor.

34 It was urged and I accept that the applicants are creditors under ss. 4 and 5 of the CCAA and as such are entitled to standing to propose a Plan for restructuring the ABCP.

35 On the return of the motion for the Initial Order, while the proceeding was technically "ex parte," a significant number of interested parties were represented. None of those parties opposed the making of the Initial Order and since then no one has come forward to challenge the entitlement of the Applicants to the Initial Order.

36 S. 8 of the CCAA renders ineffective any provisions in the trust indentures that otherwise purport to restrict, directly or indirectly, the rights of the Applicants to bring this application:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

37 See also the following for the proposition that a trust indenture cannot by its terms restrict recourse to the CCAA. [5]

38 Another feature of this Application is the joining within a single proceeding of claims by many parties against each of the Respondents. Rules 5.01 and 5.02 of the *Rules of Civil Procedure* allow for the joinder of claims by multiple applicants against multiple respondents. It is not necessary that all relief claimed by each applicant be claimed against each respondent. Here the Applicants assert claims for relief against the Respondents involving common questions of law and fact. Joining of the claims in one proceeding promotes the convenient administration of justice.

39 I am satisfied that in the unique circumstances that prevail here, the practical restructuring of the ABCP claims can only be implemented on a global basis; accordingly, if there were separate proceedings, each individual plan would of necessity have been conditional upon approval of all the other plans.

40 One further somewhat unusual aspect of this Application has been the filing of the proposed Plan along with the request for the Initial Order. This is not unusual in what have come to be known as "liquidating" CCAA applications where the creditors are in agreement when the matter first comes to Court. It is more unusual where there are a large number of creditors who are agreed but a significant number of investors who have yet to be consulted.

41 In general terms, besides complying with the technical requirements of the CCAA, this Application is consistent with the purpose and policy underlying the Act. It is well established that the CCAA is remedial legislation, intended to facilitate compromises and arrangements. The Court should give the statute a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

42 The CCAA is to be broadly interpreted as giving the Court a good deal of power and flexibility. The very brevity of the CCAA and the fact that it is silent on details permits a wide and liberal construction to enable it to serve its remedial purpose.

43 A restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring. The courts have developed new and creative remedies to ensure that the objectives of the CCAA are met.

> [45] The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. ... It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has been made! *Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.* [Emphasis added.] [6]

44 Similarly, the courts have acknowledged the need to maintain flexibility in CCAA matters, discouraging importation of any statutory provisions, restrictions or requirements that might impede creative use of the CCAA without a demonstrated need or statutory direction.

45 I am satisfied that a failure of the Plan would cause far-reaching negative consequences to investors, including pension funds, governments, business corporations and individuals.

46 All those involved, particularly the individuals, may not yet appreciate the consequences involved with a Plan failure.

47 In order that those who are affected have an opportunity to consider all the consequences and decide whether or not they are prepared to vote in favour of the proposed or any other Plan, the stay of proceedings sought in favour of those parties integrally involved in the financial management of the Conduits or whose support is essential to the Plan is appropriate.

48 S. 11 of the CCAA provides for stays of proceedings against the debtor companies. It is silent as to the availability of stays in favour of non-parties. The granting of stays in favour of non-parties has been held to be an appropriate exercise of the Court's jurisdiction. A number of authorities have supported the concept of a stay to enable a "global resolution." [7]

49 More recently in *Calpine Canada Energy Ltd., Re* [8], Romaine J. of the Alberta Court of Queens Bench permitted not only an initial order, but also one that extended after exit from CCAA without a plan so that the process of the CCAA would not be undermined against orders made during an unsuccessful plan.

50 Finally, I am satisfied at this stage of the approval of filing of the Initial Plan that all creditors be placed in a single class. The CCAA provides no statutory guidance to assist the Court in determining the proper classification of creditors. The

tests for proper classification of creditors for the purpose of voting on a CCAA plan of arrangement have been developed in the case law. [9]

51 The Plan is, in essence, an offer to all investors that must be accepted by or made binding on all investors. In light of this reality, the Applicants propose that there be a single class of creditors consisting of all ABCP holders. It is urged that all holders of ABCP invested in the Canadian marketplace with its lack of transparency and other common problems. The Plan treats all ABCP holders equitably. While the risks differ as among traditional assets, ineligible assets and synthetic assets, I am advised that the calculation of the differing risks and corresponding interests has been taken into account consistently across all of the ABCP in the Plan.

52 I am satisfied that, at least at this stage, fragmentation of classes would render it excessively difficult to obtain approval of a CCAA plan and is therefore contrary to the purpose of the CCAA.

> Not every difference in the nature of a debt due to a creditor or a group of creditors warrants the creation of a separate class. What is required is some community of interest and rights which are not so dissimilar as to make it impossible for the creditors in the class to consult with a view toward a common interest. [10]

53 The Court of Appeal for Ontario in *Stelco, Re* noted that a "commonality of interest" applied. Likely fact-driven circumstances were at the heart of classification.

> It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases. [11]

54 For the above reasons the Initial Order and Meeting Ordered will issue in the form filed and signed.

55 I note that the process includes sending to each investor a detailed and comprehensive description of the problems that developed in the ABCP market as well as its proposed solution. In a recognition that the understanding of the problem and its proposed solution might be difficult to understand, the Investor Committee is to be commended for arranging to hold information meetings across Canada.

56 I am of the view that resolution of this difficult and complex problem will be best achieved by those directly affected reaching agreement in a timely fashion for a lasting resolution.

Schedule A

Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B

Applicants

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Application granted.

Footnotes

1 See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at 31 contrasted with *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) at 316.

2 *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) per Doherty J.A. (in dissent on result but not on this point); also cases referred to in *Cadillac Fairview Inc., Re* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List])

3 *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) at paras 21-22; leave to appeal to C.A. refused, (Ont. C.A.); leave to appeal to S.C.C. refused (S.C.C.)

4 *Supra* at (2004) paragraphs 26 and 28.

5 Instruments such as trust deeds may give specified rights to creditors or any class of them in certain circumstances. Some instruments may purport to provide that a creditor may not circumvent any limitation in the rights contained in the instrument by proposing an arrangement under the CCAA and thereby obtaining wider or extended rights. ... Relief under the CCAA is available notwithstanding the terms of any instrument. [Footnote omitted.] (John D. Honsberger, *Debt Restructuring: Principles and Practice*, vol. 1 (Aurora: Canada Law Book, 1997+) at 9-18). See also *Citibank Canada v. Chase Manhattan Bank of Canada* [1991 CarswellOnt 182 (Ont. Gen. Div.)], *supra*, at paras. 25-26; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 11

6 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 45

7 *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paras. 23-25; *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) at para. 3

8 *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) at paras. 33-34; *Calpine Canada Energy Ltd., Re* [2007 CarswellAlta 156 (Alta. Q.B.)] (8 February 2007), Calgary 0501-17864 at 5

9 *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 18

10 *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at paras. 13-14

11 *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), at para. 22

End of Document

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

director means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; (*administrateur*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*, les compagnies de télégraphe, les compagnies d'assurances et les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt*. (*company*)

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

b) a commis un acte de faillite au sens de la *Loi sur la faillite et l'insolvabilité* ou est réputée insolvable au sens de la *Loi sur les liquidations et les restructurations*, que des procédures relatives à cette compagnie aient été intentées ou non sous le régime de l'une ou l'autre de ces lois;

c) a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité*;

d) est en voie de liquidation aux termes de la *Loi sur les liquidations et les restructurations* parce que la compagnie est insolvable. (*debtor company*)

contrat financier admissible Contrat d'une catégorie réglementaire. (*eligible financial contract*)

contrôleur S'agissant d'une compagnie, la personne nommée en application de l'article 11.7 pour agir à titre de contrôleur des affaires financières et autres de celle-ci. (*monitor*)

convention collective S'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre la compagnie débitrice et l'agent négociateur. (*collective agreement*)

créancier chirographaire Tout créancier d'une compagnie qui n'est pas un créancier garanti, qu'il réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire pour les détenteurs d'obligations non garanties, lesquelles sont émises en vertu d'un acte de fiducie ou autre acte fonctionnant en faveur du fiduciaire, est réputé un créancier chirographaire pour toutes les fins de la présente loi sauf la votation à une assemblée des créanciers relativement à ces obligations. (*unsecured creditor*)

domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

a) Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, la Cour suprême;

a.1) dans la province d'Ontario, la Cour supérieure de justice;

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, la Cour du Banc de la Reine;

c.1) dans la province de Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême;

d) au Yukon et dans les Territoires du Nord-Ouest, la Cour suprême et, au Nunavut, la Cour de justice du Nunavut. (*court*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

Meaning of *related* and *dealing at arm's length*

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89.

Définition de *personnes liées*

(2) Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

L.R. (1985), ch. C-36, art. 2; L.R. (1985), ch. 27 (2e suppl.), art. 10; 1990, ch. 17, art. 4; 1992, ch. 27, art. 90; 1993, ch. 34, art. 52; 1996, ch. 6, art. 167; 1997, ch. 12, art. 120(A); 1998, ch. 30, art. 14; 1999, ch. 3, art. 22, ch. 28, art. 154; 2001, ch. 9, art. 575; 2002, ch. 7, art. 133; 2004, ch. 25, art. 193; 2005, ch. 3, art. 15, ch. 47, art. 124; 2007, ch. 29, art. 104, ch. 36, art. 61 et 105; 2012, ch. 31, art. 419; 2015, ch. 3, art. 37; 2018, ch. 10, art. 89.

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Application

3 (1) La présente loi ne s'applique à une compagnie débitrice ou aux compagnies débitrices qui appartiennent au même groupe qu'elle que si le montant des réclamations contre elle ou les compagnies appartenant au même groupe, établi conformément à l'article 20, est supérieur à cinq millions de dollars ou à toute autre somme prévue par les règlements.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

Application

(2) Pour l'application de la présente loi :

a) appartiennent au même groupe deux compagnies dont l'une est la filiale de l'autre ou qui sont sous le contrôle de la même personne;

b) sont réputées appartenir au même groupe deux compagnies dont chacune appartient au groupe d'une même compagnie.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

R.S., 1985, c. C-36, s. 3; 1997, c. 12, s. 121; 2005, c. 47, s. 125.

Application

(3) Pour l'application de la présente loi, ont le contrôle d'une compagnie la personne ou les compagnies :

a) qui détiennent — ou en sont bénéficiaires —, autrement qu'à titre de garantie seulement, des valeurs mobilières conférant plus de cinquante pour cent du maximum possible des voix à l'élection des administrateurs de la compagnie;

b) dont lesdites valeurs mobilières confèrent un droit de vote dont l'exercice permet d'élire la majorité des administrateurs de la compagnie.

Application

(4) Pour l'application de la présente loi, une compagnie est la filiale d'une autre compagnie dans chacun des cas suivants :

a) elle est contrôlée :

(i) soit par l'autre compagnie,

(ii) soit par l'autre compagnie et une ou plusieurs compagnies elles-mêmes contrôlées par cette autre compagnie,

(iii) soit par des compagnies elles-mêmes contrôlées par l'autre compagnie;

b) elle est la filiale d'une filiale de l'autre compagnie.

L.R. (1985), ch. C-36, art. 3; 1997, ch. 12, art. 121; 2005, ch. 47, art. 125.

PART I

Compromises and Arrangements

Compromise with unsecured creditors

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 4.

PARTIE I

Transactions et arrangements

Transaction avec les créanciers chirographaires

4 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers chirographaires ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 4.

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 5.

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant

available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004]
O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE
OR ARRANGEMENT WITH RESPECT TO STELCO INC.
AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act

Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further outside funding — S Inc. had negative equity of $647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that

Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;

> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at

least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the

> devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .
>
> > "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
> >
> > > (a) who is for any reason unable to meet his obligations as they generally become due,
> > >
> > > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> > >
> > > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language

of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of

January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past*. I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;
>
> (e) developing restructuring alternatives; and
>
> (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> > (a) the ability to meet liabilities as they fall due; and
> >
> > (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test,

clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial

> judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had

guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles*

> *Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .

> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E,

I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

Motion dismissed.

APPENDIX

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp. | 1998 CarswellSask 335, 167 Sask. R. 14, [1998] S.J. No. 344, 80 A.C.W.S. (3d) 62, [1998] 8 W.W.R. 751 | (Sask. Q.B., May 11, 1998)

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne * Inc., proposed monitor.
John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.i General principles
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

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Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) , affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — *referred to*
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Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — *considered*
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Statutes considered:

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s. 85

s. 142

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — preamble

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43.

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Limited Partnerships Act, R.S.O. 1990, c. L.16 —

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

s. 75

Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

***Farley J.*:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured

lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments*

Inc. v. Toronto Dominion Bank , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 320 where Gibbs J.A. for the court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act* , R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these* . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

The Power to Stay

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating

> the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]
>
> I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 indicated:

> Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, *(*sub nom. *Lane v. Willis; Lane v. Beach)* [1972] 1 W.L.R. 326 (C.A.) .
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> . . . . .
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> In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 , appeal allowed by consent without costs *(*sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.)* 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.) , Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:
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> > The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:
> >
> > > (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and

how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure* , O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership* , 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited

partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* , (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

* As amended by the court.

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI

would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act* [1] ("CCAA") proceeding on October 6, 2009. [2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit

facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

> (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable. [3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest. [4]
>
> (b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.
>
> (c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit

agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated

therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re*[5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re*[6] and *Lehndorff General Partner Ltd., Re*[7].

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re* [8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups." [9] Similarly, in *Anvil Range Mining Corp., Re* [10] , the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors." [11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re* [12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is

satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order. [13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking

services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank

after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re* [14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re* [15] , I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re* [16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts*

of Justice Act [17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)* [18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re* [19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

9 Ibid at para. 16.

10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

11 Ibid at para. 34.

12 Supra, note 7 at paras. 31-35.

13 This exception also applies to the other charges granted.

14 Supra note 7 at paras. 44-48.

15 Supra note 7.

16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

17 R.S.O. 1990, c. C.43, as amended.

18 [2002] 2 S.C.R. 522 (S.C.C.).

19 Supra, note 7 at para. 52.

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2012 CarswellOnt 8413, 2012 ONSC 3767, 217 A.C.W.S. (3d) 11, 91 C.B.R. (5th) 46

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

And In the Matter of a Plan of Compromise or Arrangement of Cinram International Inc., Cinram International Income Fund, CII Trust and The Companies Listed in Schedule "A" (Applicants)

Morawetz J.

Heard: June 25, 2012
Judgment: June 26, 2012
Docket: CV-12-9767-00CL

Counsel: Robert J. Chadwick, Melaney Wagner, Caroline Descours for Applicants
Steven Golick for Warner Electra-Atlantic Corp.
Steven Weisz for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent
Tracy Sandler for Twentieth Century Fox Film Corporation
David Byers for Proposed Monitor, FTI Consulting Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Procedure
XIX.2.a.iv Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.viii Miscellaneous
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XIX.2.h Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group sought protection of Companies' Creditors Arrangement Act — C group brought application seeking initial order under Act, and relief including stay of proceedings against third party non-applicant; authorization to make pre-filing payments; and approval of certain Court-ordered charges over their assets relating to their DIP Financing, administrative costs, indemnification of their trustees, directors and officers, Key Employee Retention Plan, and consent consideration — Application granted — Applicants met all qualifications established for relief under Act

— Charges referenced in initial order were approved — Relief requested in initial order was extensive and went beyond what court usually considers on initial hearing; however, in circumstances, requested relief was appropriate — Applicants spent considerable time reviewing their alternatives and did so in consultative manner with their senior secured lenders — Senior secured lenders supported application, notwithstanding that it was clear that they would suffer significant shortfall on their positions.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group brought application seeking initial order under Companies' Creditors Arrangement Act and other relief, including authorization for C International to act as foreign representative in within proceedings to seek recognition order under Chapter 15 of U.S. Bankruptcy Code on basis that Ontario, Canada was Centre of Main Interest (COMI) of applicants — Application granted on other grounds — It is function of receiving court, in this case, U.S. Bankruptcy Court for District of Delaware, to make determination on location of COMI and to determine whether present proceeding is foreign main proceeding for purposes of Chapter 15.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Stay against third party non-applicant — C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group sought protection of Companies' Creditors Arrangement Act — C LP was not applicant in proceedings; however, C LP formed part of C group's income trust structure with C Fund, ultimate parent of C group — C group brought application seeking initial order under Act, including stay of proceedings against C LP — Application granted — Applicants met all qualifications established for relief under Act — Charges referenced in initial order were approved — Relief requested in initial order was extensive and went beyond what court usually considers on initial hearing; however, in circumstances, requested relief was appropriate.

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s. 2(1) "company" — considered

s. 2(1) "debtor company" — considered

s. 3(1) — considered

s. 3(2) — considered

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

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s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

APPLICATION by group of debtor companies for initial order and other relief under *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant

to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").

2 Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.

3 The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.

4 Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.

5 Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:

> (i) to ensure the ongoing operations of the Cinram Group;
>
> (ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and
>
> (iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").

6 Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

7 The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

8 Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

> (i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;
>
> (ii) provides various digital media services through One K Studios, LLC; and
>
> (iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

9 Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

10 The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

11 Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

12 Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

13 Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

14 Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

15 Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

16 The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

17 All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

18 As at March 31, 2012, there was approximately $233 million outstanding under the First-Lien Term Loan Facility; $19 million outstanding under the First-Lien Revolving Credit Facilities; approximately $12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately $12 million outstanding under the Second-Lien Credit Agreement.

19 Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

20 Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers,

the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

21 The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

(a) the lenders demanding payment in full for money owing under the Credit Agreements;

(b) potential termination of contracts by key suppliers; and

(c) potential termination of contracts by customers.

22 As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession ("DIP") Financing in the amount of $15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of $15 million.

23 The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

(a) the active employment of employees in the ordinary course;

(b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;

(c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and

(d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

24 Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

25 The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

26 In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

27 Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties.

The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

28 Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

29 Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

30 Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

31 The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

> Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

32 Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

33 The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

34 Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

35 The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

36 In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

37 As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

38 The Applicants have also requested that the confidential supplement — which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules — be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

39 Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

40 In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

> (a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;
>
> (b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;
>
> (c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;
>
> (d) meetings of the board of trustees and board of directors typically take place in Canada;
>
> (e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;
>
> (f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;
>
> (g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;
>
> (h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;
>
> (i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;
>
> (j) new business development initiatives are centralized and managed from Toronto, Ontario; and
>
> (k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

41 Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

42 The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15.

43 In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

Schedule "A"

Additional Applicants

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

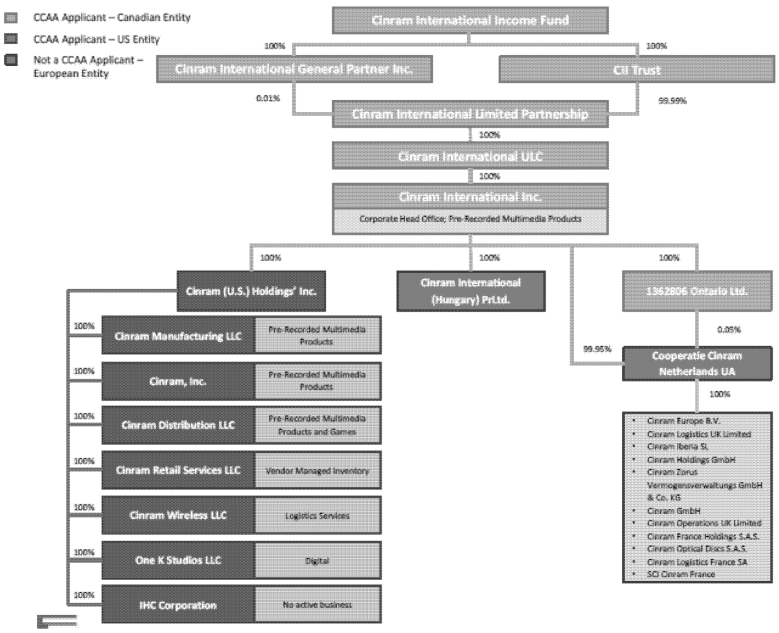
Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

Schedule "B"



Graphic 1

Schedule "C"

A. The Applicants Are "Debtor Companies" to Which the CCAA Applies

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds $5 million.

CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.
>
> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are "companies"

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Canwest Global Communications Corp., Re (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants ("*Book of Authorities*"), Tab 1.

Global Light Telecommunications Inc., Re (2004), 2 C.B.R. (5th) 210 (B.C. S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

Global Light Telecommunications Inc., Re, *supra* at para. 17; Book of Authorities, Tab 2.

Cadillac Fairview Inc., Re (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), which defines an "insolvent person" as a person (i) who is

not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

a. is for any reason unable to meet his obligations as they generally become due;

b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or

c. the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 ("insolvent person").

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), at para.4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco Inc., Re, *supra* at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco Inc., Re, *supra* at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.

b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.

d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of $5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

> a. companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person; and
>
> b. two companies are affiliated with the same company at the same time are deemed to be affiliated with each other.
>
> CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

> Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately $252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately $12 million in letter of credit exposure) and approximately $12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed $5 million.

> Bell Affidavit, paras. 75; Application Record, Tab 2.

B. The Relief is Available under The CCAA and Consistent with the Purpose and Policy of the CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

> *Nova Metal Products Inc. v. Comiskey (Trustee of)*, *supra* at paras. 22 and 56-60; Book of Authorities, Tab 4. *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para. 5; Book of Authorities, Tab 6.
>
> *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

> *Sulphur Corp. of Canada Ltd., Re* (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.) ("*Sulphur*") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) The Stay of Proceedings Against Non-Applicants is Appropriate

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;

b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and

c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

Lehndorff General Partner Ltd., Re, *supra* at para. 5; Book of Authorities, Tab 6. *Canwest Global Communications Corp., Re*, *supra* at para. 27; Book of Authorities, Tab 1.

CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

Lehndorff General Partner Ltd., Re, *supra* at paras. 5 and 16; Book of Authorities, Tab 6.

T. Eaton Co., Re (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

a. where it is important to the reorganization process;

b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;

c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and

d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10. *Lehndorff General Partner Ltd., Re*, *supra* at para. 21; Book of Authorities, Tab 6.

Canwest Global Communications Corp., Re, *supra* at paras. 28 and 29; Book of Authorities, Tab 1.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 5, 18, and 31; Book of Authorities, Tab 11.

Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Canwest Global Communications Corp., Re*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Canwest Global Communications Corp., Re supra, at paras. 41 and 43; Book of Authorities, Tab 1.

68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;

b. the applicants' dependency on the uninterrupted supply of the goods or services;

c. the fact that no payments would be made without the consent of the Monitor;

d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global Communications Corp., Re supra, at para. 43; Book of Authorities, Tab 1.

Brainhunter Inc., Re, [2009] O.J. No. 5207 (Ont. S.C.J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.

Priszm Income Fund, Re (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of $15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:

> 11.2(1) *Interim financing* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> 11.2(2) *Priority* — secured creditors — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> *Timminco Ltd., Re*, 211 A.C.W.S. (3d) 881 (Ont. S.C.J. [Commercial List]) [2012 CarswellOnt 1466] at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> 11.2(4) Factors to be considered — In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(*b*), if any.
>
> CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrows funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

> *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

> *Re Catalyst Paper Corporation*, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.
>
> *Angiotech*, *supra*, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18

Fraser Papers Inc., Re [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;

b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;

c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedingsand implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;

d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;

e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;

f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;

g. the DIP Lenders' Charge will not secure any pre-filing obligations;

h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings;and

i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent, the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

11.52(1) *Court may order security or charge to cover certain costs*

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) *Priority*

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco Ltd., Re*, *Canwest Global Communications Corp., Re* and *Canwest Publishing Inc./Publications Canwest Inc., Re*.

Canwest Global Communications Corp., Re, *supra*; Book of Authorities, Tab 1.

Canwest Publishing, *supra*; Book of Authorities, Tab 16.

Timminco Ltd., Re, 2012 ONSC 106 (Ont. S.C.J. [Commercial List]) [*Timminco*]; Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

a. the size and complexity of the business being restructured;

b. the proposed role of the beneficiaries of the charge;

c. whether there is unwarranted duplication of roles;

d. whether the quantum of the proposed charge appears to be fair and reasonable;

e. the position of the secured creditors likely to be affected by the charge; and

f. the position of the Monitor.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, *supra*, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;

b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;

c. there is no unwarranted duplication of roles;

d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and

e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

11.51(1) *Security or charge relating to director's indemnification*

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) *Priority*

The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

11.51(3) *Restriction* — indemnification insurance

The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) *Negligence, misconduct or fault*

The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global Communications Corp., Re*, the Court outlined the test for granting such a charge:

I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

Canwest Global Communications Corp., Re, *supra* at paras 46-48; Book of Authorities, Tab 1.

Canwest Publishing, *supra* at paras. 56-57; Book of Authorities, Tab 16.

Timminco, *supra* at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD$13 million, given:

a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;

c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;

d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;

e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Grant Forest Products Inc., Re* [2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])] considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

d. the employees' history with and knowledge of the debtor;

e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Grant Forest Products Inc., Re, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.

Canwest Publishing Inc./Publications Canwest Inc., Re supra, at paras 59; Book of Authorities, Tab 16.

Canwest Global Communications Corp., Re supra, at para. 49; Book of Authorities, Tab 1.

Timminco Ltd., Re (2012), 95 C.C.P.B. 48 (Ont. S.C.J. [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest Products Inc., Re, *supra* at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD$3 million, given:

a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora Employees to remain with the Cinram Group while the company pursued its restructuring efforts;

b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;

c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;

d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;

e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;

f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest Corp., Re*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement

(or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

Sino-Forest Corp., Re, *supra*, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;

b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

Bell Affidavit, para. 176; Application Record, Tab 2.

Application granted.

End of Document

2016 ONSC 3288
Ontario Superior Court of Justice [Commercial List]

Urbancorp Toronto Management Inc., Re

2016 CarswellOnt 8410, 2016 ONSC 3288, 267 A.C.W.S. (3d) 23, 37 C.B.R. (6th) 44

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. c-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Urbancorp Toronto Management Inc., Urbancorp (St. Clair Village) Inc., Urbancorp (Patricia) Inc., Urbancorp (Mallow) Inc., Urbancorp (Lawrence) Inc., Urbancorp Downsview Park Development Inc., Urbancorp Residential Inc., Urbancorp (952 Queen West) Inc., King Residential Inc., Urbancorp 60 St. Clair Inc., High Res. Inc., Bridge on King Inc. (Collectively the "Applicants") and The Affilliated Entities Listed in Schedule "A" Hereto

In the Matter of Urbancorp Inc. Application of Guy Gissin, The Foreign Representative of Urbancorp Inc., under Section 46 of the Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36, as Amended

Newbould J.

Heard: May 18, 2016
Judgment: May 25, 2016
Docket: CV-16-11389-00CL, CV-16-11392-00CL

Counsel: Edmund F.B. Lamek, Rachael Belanger, for Applicants
L. Joseph Latham, Tamryn Jacobson, for Guy Gissin, Foreign Representative of Urbancorp Inc.
Robin B. Schwill, Jay Swartz, for KSV Kofman Inc.
Jane Dietrich, for Mattany (Downsview) Inc.
Scott Bomhof, for King Liberty North Corporation
Adam Slavens, for Tarion Warranty Corporation
Heather Meredith, for Bank of Nova Scotia
Clifton P. Prophet, Frank Lamie, for Canadian Imperial Bank of Commerce
John Paul Ventrella, for Atrium Mortgage Investment Mortgage
Aubrey E. Kauffman, for Travelers Guarantee Company of Canada
Brian Empey, for Parc Downsview Park Inc.

Subject: Insolvency; International

2016 ONSC 3288, 2016 CarswellOnt 8410, 267 A.C.W.S. (3d) 23, 37 C.B.R. (6th) 44

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

Company issued debentures that traded on Tel Aviv Stock Exchange — Indenture trustees of Israel debentures asserted that company defaulted under terms of debenture trust and initiated court proceedings against company in Israel — Israeli court issued injunction to prevent company from taking any further steps to deal with it's assets — Israeli court appointed functionary officer of company with full management control and powers over subsidiaries — Applicants were company subsidiaries and were insolvent — Applicants were unable to raise necessary financing to advance their major projects beyond their current stages of development — Applicants applied for relief under Companies' Creditors Arrangement Act CCAA — Some of applicants earlier filed notice of intent (NOI) to make proposal under Bankruptcy and Insolvency Act but did not file proposals — Those applicants applied to continue NOI proceedings in CCAA proceeding — Application granted — Foreign proceeding in Israeli court was to be recognized as foreign main proceeding under CCAA and initial recognition order was to provide stay of any proceeding against company and prohibit it from selling property in Canada without leave of court — Parties agreed that while Israeli proceeding would be considered to be foreign main proceeding, functionary officer appointed by Israeli court as foreign representative agreed that his sole control of company and its assets would be exercised by monitor acting under CCAA so long as monitor acted in good faith collaboratively with functionary officer — Proposed continuation of NOI proceedings as CCAA proceeding was consistent with purposes of CCAA — Continuation also assisted in co-operative proceedings with functionary officer — Interim lender's charge to secure interim funding was granted.

APPLICATION by company subsidiaries for continuation of notice of intent to make bankruptcy proposal in *Companies' Creditors Arrangement Act* proceeding.

***Newbould J.*:**

1 A number of Urbancorp Inc. ("UC Inc.") subsidiaries applied on May 18, 2016 for relief under the CCAA, including relief in respect of a number of non-applicant affiliated limited partnerships which may not be insolvent. [1] Some of the applicants earlier filed a notice of intent to make a proposal under section 50.4(1) of the BIA. These applicants apply to continue the NOI proceedings in this CCAA proceeding.

2 UC Inc. is not an applicant in this CCAA proceeding. However, it issued debentures which traded on the Tel Aviv Stock Exchange. The trustee of those bonds alleged default by UC Inc. and, after the NOI proceedings were started in Canada, initiated a claim for relief in the District Court of Tel Aviv-Yafo, Israel (the "Israeli Court"). Orders were made granting relief to the trustee and Mr. Guy Gissin was appointed by the Israeli Court as the functionary officer and foreign representative

of UC Inc. He has brought proceedings under Part IV of the CCAA for an initial recognition order and a supplemental order recognizing orders made by the Israeli Court.

3 It is evident that these two competing applications, if not resolved in some consensual way, would cause great difficulty in any restructuring of the Urbancorp Group. Fortunately, due to the efforts of Mr. Gissin and KSV, the proposal trustee and now the proposed Monitor, and their counsel, an agreement in principle to co-operate on a process to realize upon the assets of the Urbancorp Group has been reached and is contained in a Co-operation Protocol signed by Mr. Gissin and KSV.

4 At the conclusion of the hearing, I granted the Initial Order and the recognition and supplemental orders sought by Mr. Gissin as the foreign representative, including the approval of the Co-Operation Protocol, for reasons to follow. These are my reasons.

Factual background

5 The Urbancorp Group was founded in 1991 by Alan Saskin. As is typical in the real estate development industry, the Urbancorp Group generally uses single purpose project specific corporations to engage in the development, construction and sale of residential properties in the greater Toronto area. Since 2015, the Urbancorp Group has essentially been organized into two branches — the corporations which are owned directly or indirectly by Mr. Saskin or members of his family, which includes UTMI, and the entities that, as of December 2015, became UC Inc. subsidiaries. The majority of the Urbancorp corporations that are applicants in this proceeding have been formed as single purposes entities in connection with the construction and ownership of specific development projects.

6 The Urbancorp Group has redeveloped over 100 acres of former industrial lands in the GTA, turning them into downtown neighbourhoods. The Urbancorp Group was the first developer in the King West village area of Toronto and created the neighbourhood named "King West Village". In the West Queen West Triangle area of Toronto, across from the Drake hotel, the Urbancorp Group developed most of the homes, over 1,600 in that neighbourhood. In partnership with Artscape, a nonprofit provider of affordable artist housing, the Urbancorp Group developed 72 units of affordable artist housing in West Queen West. The Urbancorp Group has donated land and paid for public parks in the City of Toronto, including four public parks in the King and Queen West areas.

7 The Urbancorp Group has built over 5500 homes. It delivered 1,028 homes in the past two years, and currently has 1,058 additional homes under construction.

8 However, as a result of the recent lack of liquidity described in detail in the affidavit of Mr. Siskin, the applicants are insolvent and cannot meet their liabilities generally as they become due, and as a result, the operations of all of the Urbancorp applicants and related entities has been put at risk.

9 Mr. Saskin in his affidavit states that the primary financial challenge facing the Urbancorp applicants and related entities at this time, particularly the entities that filed NOI proceedings, is their inability to raise the necessary financing to advance their major projects beyond their current stages of development. This is due to a number of events, including the recent steps by Tarion Warranty Corporation to revoke certain Tarion registration certificates, and events relating to UC Inc. and its issuance of debentures in Israel. These events and the publicity and press surrounding them have materially threatened the ability of the non-applicant UC entities to carry on business in the ordinary course.

10 UC Inc. is an Ontario company created for the purpose of issuing debentures to the Israeli public on the Tel Aviv Stock Exchange. Prior to listing the debentures Mr. Saskin and his family members agreed to transfer into UC Inc. their interests in five corporations within the Urbancorp Group that directly or indirectly held interests in several investment properties, rental properties and geothermal assets in Toronto

11 UC Inc. issued NIS 180,583,000 (approx. $64 million based on the exchange rate at that time) par value of debentures which traded on the Tel Aviv Stock Exchange. The terms of the debentures contemplate UC Inc. repaying the debentures in five unequal installments on December 31, 2017, June 30, 2018, December 31, 2018, June 30, 2019 and December 31, 2019. The exclusive jurisdiction to determine all matters related to the debentures lies with a competent court in the State of Israel and pursuant to the governing laws of Israel.

12 On March 31, 2015, Tarion Warranty Corporation, which provides warranties on new residential builds in Ontario for registered builders, issued a notice of proposal to revoke 17 of the Urbancorp Group's registrations as a result of concerns about the Urbancorp Group's financial position and the high number of warranty claims made against two non UC Inc. entities. The Urbancorp Group has since appealed Tarion's decision for 11 of the 17 registrations, and allowed the balance to expire. No decision has been rendered in connection with the appeal as of this date.

13 The indenture trustee of the Israeli debentures alleged that UC Inc. had defaulted under the terms of the debenture trust. On April 24, 2016, the trustee initiated court proceedings against UC Inc. in the Israeli Court. Prior to those proceedings being initiated, the Urbancorp Group's Israeli auditors, Israeli legal counsel and UC Inc.'s board of directors resigned, leaving Mr. Saskin as the sole director of UC Inc. The trustee's application was initially heard on the morning of Sunday, April 24, 2016, at which time the Vice President of the Israeli Court issued an injunction to prevent UC Inc. or Mr. Saskin from taking any further steps to deal with UC Inc.'s assets.

14 On Monday, April 25, 2016, the Israeli Court appointed Mr. Gissin as the functionary officer of UC Inc., with full management control and powers over its subsidiaries. The authority granted to Mr. Gissin under the order included the authority to seize all of UC Inc.'s assets, to exercise UC Inc.'s power of control over its subsidiaries and to approach the Canadian court as an authorized

representative of UC Inc. The orders of the Israeli Court would clearly have prevented Mr. Siskin from taking steps to cause the subsidiaries of UC Inc. to file for protection under the CCAA and would have permitted Mr. Gissin to take steps to prevent the applicants from doing so.

15 On May 4, 2016, Mr. Gissin and his counsel met with KSV and its counsel, the result of which was an agreement in principle to co-operate on a process to realize upon the assets of the Urbancorp Group through a CCAA process, with KSV having augmented powers to control management and operations of the Urbancorp Group entities which would be filing, effectively removing Saskin as a decision-maker for those companies, all as set forth in a Co-operation Protocol finalized on May 13, 2016.

16 On May 13, 2016, each of the Urbancorp CCAA applicants and related entities, as borrowers, and UC King South, as lender, entered into an intercompany interim credit facility term sheet whereby UC King South agreed to make available to the Urbancorp entities that had filed a NOI proceeding a revolving credit facility in the amount of $1.9 million to finance their day-to-day operations and ongoing projects. UC King South is not an applicant in this proceeding. All proceeds of the interim loan continue to be held by KSV in its trust account. Based upon the anticipated cash flow needs of the Urbancorp CCAA applicants and related entities during these restructuring proceedings, including professional fees associated with these proceedings, it is likely that the $1.9 million may not be sufficient to see the restructuring through to its completion. As a result, the applicants intend to commence a process to secure third party debtor-in-possession financing in the near term.

Issues and analysis

(1) Recognition of Foreign Proceeding

17 Section 46(1) of the CCAA provides for the application by a foreign representative to recognize a foreign proceeding. Pursuant to section 47(1) of the CCAA, the court shall make an order recognizing the foreign proceeding if (i) the proceeding is a foreign proceeding and (ii) the applicant is a foreign representative of that proceeding.

18 A foreign proceeding is broadly defined in section 47(1) to mean a judicial or an administrative proceeding in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

19 It is clear in this case that the proceeding in the Israeli Court is a foreign proceeding within the meaning of the CCAA. It is a judicial proceeding brought under Israel's regulations relating to requests for compromise or arrangements, and the relief granted by the Israeli Court, including

the appointment of a functionary officer, was for the purpose of enhancing creditors' collective interests.

20 Section 45(1) of the CCAA defines a foreign representative as a person or body who is authorized in a foreign proceeding in respect of a debtor company to (a) administer the debtor's property or affairs for the purpose of reorganization or liquidation or (b) act as a representative in respect of the foreign proceeding.

21 It is also the case that the Mr. Gissin is a foreign representative in respect of the foreign proceeding. He was appointed to monitor UCI's business and financial affairs and to act as a representative in respect of the foreign proceeding. He was provided with the express authority to seize all of UC Inc.'s assets, to exercise UC Inc.'s power of control of its subsidiaries and to approach the Canadian court as an authorized representative of UC Inc.

22 Thus the foreign proceeding in the Israeli Court is to be recognized as a foreign proceeding under section 47(1) of the CCAA.

23 Section 47(2) requires a finding as to whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. If the foreign proceeding is recognized as a main proceeding, there is an automatic stay provided in section 48(1) of the CCAA against law suits concerning the debtor's property, debts, liabilities or obligations and prohibitions against selling or disposing of property in Canada. If the foreign proceeding is recognized as a non-main proceeding, there is no such automatic stay and prohibition and it is necessary for an application to be made under section 49(1) to obtain such relief. For that reason, it is advantageous for a foreign representative to seek an order recognizing the foreign proceeding as a main proceeding. Mr. Gissin in this case has made such a request.

24 A foreign main proceeding is defined in section 45(1) as a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests (COMI). Section 45(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

25 In this case, UC Inc.'s registered office is in Ontario. Pursuant to the Co-operation Protocol Mr. Gissin as the foreign representative has applied to have the Israeli Court proceeding recognized as a foreign main proceeding.

26 The Co-operation Protocol sets out in some detail an agreement to work cooperatively to maximize recoveries through an orderly process for the stakeholders of UC Inc. and the applicants. Without such an agreement, there would no doubt have been contentious proceedings between the two spheres, being the Israeli sphere and the Canadian sphere. That has been avoided. The Co-operation Protocol provides that Mr. Gissin will apply under Part IV of the CCAA to be recognized as the foreign representative of a foreign main proceeding. The applicants in the CCAA

proceedings will propose that the Monitor have augmented powers to control the ordinary course management and receipt and disbursements of funds for the applicants and acknowledge that Mr. Gissin shall have standing in these proceedings to represent UC Inc. The Monitor and Mr. Gissin shall attempt to agree on the restructuring or sale process but if they cannot agree the decision will be made by this Court on the application of the Monitor. It is agreed that so long as the Monitor acts in good faith and has not engaged in wilful conduct or gross negligence, Mr. Gissin will not take any steps to remove KSV as the Monitor or to suggest that KSV must take instruction from Mr. Gissin or the Israeli Court.

27 Thus the parties have agreed that while the Israeli proceeding will be considered to be a foreign main proceeding, Mr. Gissin as the foreign representative has agreed that his sole control of UC Inc. and its assets that was granted to him by the Israeli Court will to a large extent be exercised by the Monitor acting under the CCAA so long as the Monitor acts in good faith collaboratively with Mr. Gissin in accordance with the Co-operation Protocol. This is a very unusual situation in that as a practical matter it is not intended that orders will be made in the future in the foreign main proceeding directing the restructuring of UC Inc. and its subsidiaries with recognition orders being sought in Canada to have such orders carried out in Canada.

28 It is not clear that the COMI of UC Inc. is in Israeli. The proceedings started in Israel because the Prospectus and the Deed of Trust made clear that Israeli courts were to have exclusive jurisdiction to deal with matters related to UC Inc., and that insolvency proceedings regarding UC Inc. could only be brought in the State of Israel.

29 I am reluctant however to upset the balance that has been struck in this case by the Co-operation Protocol. Mr. Gissin in his affidavit has emphasized the importance of the proceedings to the stakeholders of UC Inc. in Israel and the importance of the different legal regimes working together. He has stated:

> 32. This matter is one of incredible significance to stakeholders in the State of Israel, including the real estate capital markets in general. To date, to the best of my knowledge, a total of 17 North American real estate companies have issued over NIS 11 billion of bonds in Israel. UCI [UC Inc.] was the first such North American company to have gone into insolvency proceedings, and that within four months from the issuance of the Debentures. Given the size of this industry in Israel, this case is being watched very carefully to see how the different legal regimes can work together. I am hopeful that the co-operation evidenced to date in this matter, and in particular through the Co-Operation Protocol, can be continued for the benefit of all affected stakeholders.

30 In this case, so long as the Co-operation Protocol exists, it may not be of much importance in Canada whether the foreign proceeding is a foreign main proceeding, as Mr. Gissin would be entitled as a matter of discretion under a foreign non-main proceeding to a granting of a stay of

proceedings against UC Inc. and to an order prohibiting a sale of its property in Canada without leave of the Court. It probably is of more importance in Israel in insuring that if the co-operation between the foreign representative and the Monitor no longer exists and the Monitor acts in bad faith or engages in wilful conduct or gross negligence, the foreign representative will have the ability to go back to the Israeli Court as the court in a foreign main proceeding to seek appropriate relief that could then be sought to be recognized in Canada.

31 The applicants, the Monitor and the foreign representative are all in agreement that an order be sought declaring the Israeli proceedings as the foreign main proceedings and no one appearing is opposing the order sought. In these unusual circumstances I am prepared to make an order that the proceeding in Israel is a foreign main proceeding. It follows that the initial recognition order is to provide a stay of any proceedings against UC Inc. and prohibit UC Inc. from selling or disposing of property in Canada without leave of the Court.

32 It would be expected that if the Israeli Court in the future changed Mr. Gissin's mandate to increase or decrease his authorities or functions or provide any additional mandate in respect of UC Inc., such orders would be brought to the attention of this Court and any application made in connection with them would be made in these Part IV proceedings.

33 It is also appropriate that a supplemental order be made (i) recognizing the decision made in the foreign proceeding by the Israeli Court, (ii) appointing KSV as the information officer, (iii) approving the Co-operation Protocol, (iv) staying any proceedings against or in respect of Mr. Gissin as foreign representative of UC Inc., (v) granting an administration charge of $400,000 for the costs of the foreign representative, its legal and financial advisors and of the information officer and its counsel and (vi) approval of the funding of the costs of the foreign representative, its legal and financial advisors and of the information officer and its counsel to be covered by the interim funding charge.

34 With respect to the administration charge, there are no secured creditors of UC Inc. The principal creditors are the Israeli bondholders under the debentures. The foreign representative and the information officer are important to the process and the quantum of the charge is reasonable.

35 With respect to the interim financing and the charge for it, KSV presently has the amount of CAD $1,900,000 in a trust account, which funds KSV received from UC KING SOUTH, and which funds KSV proposes to utilize as a form of interim funding for certain costs in connection with the CCAA proceedings. It is appropriate for this charge to also cover the professional fees and other reasonable costs incurred by the foreign representative in the CCAA proceedings and of the Information Officer and its counsel.

(2) Continuation under the CCAA

36 Section 11.6(a) provides:

> 11.6 Notwithstanding the Bankruptcy and Insolvency Act,
>
> > (a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part;

37 None of the Urbancorp entities that filed a notice of intention under Subsection 50.4(1) of the BIA has filed a proposal.

38 In *Clothing for Modern Times Ltd., Re*, 2011 ONSC 7522 (Ont. S.C.J. [Commercial List]), Brown J. (as he then was) expressed the view that on a motion to continue under the CCAA an applicant company should place before the court evidence that the proposed continuation would be consistent with the purposes of the CCAA. Morawetz J. (as he then was) referred to and adopted the same point of view in *Comstock Canada Ltd., Re* (2013), 4 C.B.R. (6th) 47 (Ont. S.C.J.). I take this to be a reflection of the fact that an initial order should be made in a CCAA proceeding only if the purpose of the application is consistent with the purposes of the CCAA.

39 In my view, the proposed continuation of the NOI proceedings as a CCAA proceeding is in accordance and consistent with the purposes of the CCAA. The purpose here is to attempt a restructuring of the Urbancorp business which is the subject of this application, including those entities which had filed NOI proceedings and other highly interconnected entities. It is under the CCAA and the jurisprudence that has developed that permits protection being provided both to the applicant companies and its related limited partnership entities that may not be insolvent. The continuation also assists in the co-operative proceeding with Mr. Gissin as the foreign representative of UC Inc. who is being recognized under Part IV of the CCAA.

40 I am satisfied that the NOI proceedings commenced under the BIA should be taken up and continued under the CCAA.

(3) Protection under the CCAA

41 The applicants and their related entities have total claims against them in excess of $5 million.

42 I am satisfied that the applicants meet the *Stelco* test of insolvency enunciated by Justice Farley in *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused, [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to SCC refused, [2004] S.C.C.A. No. 336 (S.C.C.). The applicants are currently unable or will imminently be unable to meet such claims generally as they become due. The primary financial challenge facing the Urbancorp applicants and their related entities is their inability to raise the necessary financing to advance their major projects beyond their current stages of development. This is due to a number of events, including the recent steps by Tarion to revoke certain Tarion registration certificates, and events relating to UC Inc. and the Israeli debentures. These events and the publicity and press

surrounding them have materially threatened the ability of the non-applicant Urbancorp entities to carry on business in the ordinary course.

43 A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Priszm Income Fund, Re* (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and has been followed in several cases, including *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]), *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) and *4519922 Canada Inc., Re* (2015), 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]).

44 I am satisfied that the stay of proceedings provided for in the Initial Order should extend to the related limited partnerships. Each is significantly interrelated to the business of the insolvent applicants as they and their stakeholders, assets (in many cases beneficial ownership of the assets of applicants), and intercompany payables and receivables in particular, form an integral part of the operations of the Urbancorp Group. Although they are not currently technically insolvent, the evidence is that it was reasonably expected at the time of filing that, without the benefit of a stay of proceedings, they will run out of liquidity before the time that would reasonably be required to implement a restructuring.

45 The applicants seek an interim lender's charge to secure the interim funding from UC King South. It is to be secured against those Urbancorp entities that utilize any of the funds. The applicants also seek the authority for the Monitor to utilize an aggregate of up to $1 million of cash which exists within the Urbancorp CCAA entities, to fund the cash flow requirements of other Urbancorp CCAA affiliates on an intercompany basis during these proceedings, secured by an intercompany lender's charge over the borrower entity's assets, properties and undertakings in favour of the lender entity, to rank *pari passu* with the interim lender's charge.

46 I am satisfied after a consideration of the factors set out in section 11.2(4) of the CCAA that these charges should be granted. The charges will be subordinate to existing secured creditors and lienholders and will not secure any pre-filing obligations [2]. The money is clearly needed for the restructuring process and the charges are supported by the proposed Monitor who will have enhanced powers to operate the business during the restructuring with the authority to approve the advances.

47 Other charges normal in CCAA cases are proposed. They are a director's and officer's charge in the amount of $300,000 for the sole remaining director of the applicants after Mr. Siskin's retirement as a director and an administrative charge in the amount of $750,000. These charges are reasonable and supported by the proposed Monitor. They are approved.

48 At the conclusion of the hearing on May 18, 2016 I signed the Initial Order in the applicants' CCAA application and the Initial Order and supplemental orders on the application of Mr. Gissin under Part IV of the CCAA.

Application granted.

Footnotes

1 Urbancorp New Kings Inc. was inadvertently included as an applicant when this proceeding was first commenced. It has been removed as an applicant as it is not an insolvent corporation.

2 An exception to the subordination to secured creditors is the Reznick Trust under the Israeli debenture which is to be subordinate to the Charges. Apparently there is still some issue because of the lack of time to deal with it as to what security if any there is to support the Reznick Trust. It may be that some future motion may be necessary to deal with this subordination exception.

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